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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission's denial of statutory prices to an interstate pipeline company contravenes the mandate of this Court in *Public Service Commission of New York v. Mid-Louisiana Gas Co.*, 103 S. Ct. 3024 (1983).

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

Consolidated Gas Transmission Corporation

Federal Energy Regulatory Commission

Public Service Commission of the State of New York

Public Service Commission of West Virginia

The Petitioner, Consolidated Gas Transmission Corporation, is a wholly-owned subsidiary of Consolidated Natural Gas Company. Other wholly-owned subsidiaries of Consolidated Natural Gas Company are: Consolidated Natural Gas Service Co., Inc.; The East Ohio Company; The Peoples Natural Gas Company; West Ohio Gas Company; The River Gas Company; CNG Producing Company; CNG Development Company; CNG Energy Company; Consolidated System LNG Company; CNG Research Company; and CNG Coal Company.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") is reported at 745 F.2d 281, and is reproduced in Petitioner's Appendix 1a-21a.[1] The orders of the Federal Energy Regulatory Commission ("Commission")[2] are reported at 22 F.E.R.C. (CCH) ¶ 61,120 (Feb. 4, 1983) and 23 F.E.R.C. (CCH) ¶ 61,018 (April 6, 1983) and are reproduced in App. 22a-43a.

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[1] Petitioner's Appendix refers to the appendix to the petition hereto, and hereinafter shall be referred to as "App."

[2] The term "Commission" refers to the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission.

JURISDICTION

The judgment of the Fourth Circuit is dated September 24, 1984. Consolidated Gas Transmission Corporation ("Consolidated") filed a timely petition for rehearing and suggestion for rehearing in banc. The court denied that petition on October 31, 1984. On January 4, 1985, Consolidated applied for an extension of time in which to file a petition for a writ of certiorari to and including March 30, 1985. By order of the Chief Justice of the United States dated January 10, 1985, the time for filing the petition was extended to March 30, 1985. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves consideration of section 2(21) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 (21) (1982), Commission Order No. 16, F.E.R.C. STATUTES AND REGULATIONS (CCH) ¶ 30,023 (1978), and the Commission's regulations governing purchased gas cost adjustment filings, 18 C.F.R. § 154.38 (1984). These provisions are reproduced in App. 44a-62a.

STATEMENT OF THE CASE

This case arises from a Fourth Circuit decision that denied Consolidated revenues that this Court had found were specifically authorized by the Natural Gas Policy Act of 1978 ("NGPA").[3] Consolidated is an interstate natural gas pipeline company that produces, purchases, stores, transports, and sells natural gas for resale.[4] This case involves the pricing of certain natural gas that Con-

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[3] 15 U.S.C. §§ 3301-3432 (1982). *See* Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co., 103 S.Ct. 3024 (1983).

[4] Consolidated conducted its operations as "Consolidated Gas Supply Corporation" prior to a corporate reorganization that became effective as of January 1, 1984.

solidated produces, specifically, gas produced from wells drilled before January 1, 1973 on leases acquired before October 8, 1969 (hereinafter referred to as "old pipeline production").

1. Regulatory Background

Before Congress enacted the NGPA, natural gas produced by interstate natural gas pipeline companies ("pipeline production") was subject to different forms of rate regulation depending upon the date of lease acquisition and the date that drilling commenced. As a result, Consolidated was required to price some of its pipeline production on a cost of service basis and other pipeline production under Commission-approved area or nationwide rates. Consolidated's old pipeline production received cost of service treatment.[5]

The NGPA established maximum lawful prices, effective December 1, 1978, for all "first sales" of domestically-produced natural gas regardless of the lease acquisition date, the date of commencement of drilling, or the identity of the producer. The prices established under the

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[5] Basically, cost of service pricing includes the cost of producing gas together with all other costs of the pipeline. The investment in production is also included in the rate base upon which the Commission permits the pipeline to earn a return. The Commission initially regulated pipeline production on a cost of service basis, but began applying area rates to pipeline production for new leases in 1969, subject to an exception that permitted the pipeline to seek cost of service treatment under "special circumstances." The Commission continued to price pipeline production from leases acquired before 1969 on a cost of service basis. *See* City of Chicago v. Federal Power Commission, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). The Commission subsequently provided that pipeline production from wells commenced after January 1, 1973, that were drilled on leases acquired before October 8, 1969, would receive nationwide rates. *See* Shell Oil Co. v. Federal Power Commission, 520 F.2d 1061 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).

NGPA apply to *all* production—including old pipeline production.[6]

Shortly after Congress enacted the NGPA, the Commission promulgated regulations that changed the way pipelines were permitted to recover their gas costs. Prior to those regulations, interstate pipeline companies were free to recover changes in the cost of their gas either through a purchased gas cost adjustment ("PGA") filing or a general rate filing under section 4 of the Natural Gas Act. The new regulations required the pipelines to elect one way or the other.[7] The Commission's regulations also amended the definition of "purchased gas costs" recoverable through the PGA to include pipeline production where such production "qualifies for and is being afforded area or nationwide rate treatment or is otherwise being afforded rate treatment as though the gas were being produced by an independent producer." [8] Thus, if a pipeline company elected to recover changes in the cost of its purchased gas through its PGA, as Consolidated did, the Commission required that the costs of all production receiving NGPA prices be recovered *only* through the PGA; changes in gas costs could not then be reflected in general rate case proceedings.

On November 27, 1978, Consolidated filed tariff revisions to be effective December 1, 1978, to amend the PGA clause of its tariff specifically to permit the recovery of

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[6] Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co., 103 S. Ct. 3024 (1983).

[7] Order No. 16, FERC STATUTES AND REGULATIONS (CCH) ¶ 30,023 (1978). App. 47a-62a. A PGA filing is a semiannual filing to reflect changes in a pipeline's gas costs. *See* 18 C.F.R. § 154.38(d)(4) (1984). To reflect changes in all other costs, a pipeline must make a general rate increase filing under section 4 of the Natural Gas Act, 15 U.S.C. § 717c (1982), which is governed by different Commission regulations. *See* 18 C.F.R. § 154.63(b)(3) (1984).

[8] App. 56a n.1.

NGPA statutory prices for all pipeline production that "qualifies for area, nationwide, or statutory rate treatment." [9] The Commission accepted Consolidated's revised PGA tariff.[10] As a result, at *all* times since December 1, 1978, Consolidated's Commission-approved tariff has permitted Consolidated to recover, through its PGA, NGPA prices for all pipeline production qualifying for statutory rate treatment.

On December 1, 1978, the Commission promulgated and made effective interim regulations that defined those natural gas sales that qualified for the NGPA statutory prices. The Commission specifically excluded all pipeline production from the ambit of the NGPA. Consolidated sought reconsideration and stay of those regulations, contending that the regulations were unlawful and, that in the absence of a stay, Consolidated would suffer irreparable harm. In its order denying the stay, the Commission rejected Consolidated's claim of irreparable harm and assured Consolidated that "[i]n the event a court determines that this [pipeline production] regulation is unlawful, this Commission could authorize the collection of revenues denied by this provision through surcharges." [11]

On November 14, 1979, the Commission promulgated its final rule on the pricing of old pipeline production. The Commission declared that, with minor exceptions, the NGPA did not apply to that production.[12] Those regulations were subsequently vacated by the Fifth Circuit and by this Court.[13]

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[9] App. 63a-64a. *See* App. 85a.

[10] App. 63a.

[11] App. 66a.

[12] 44 Fed. Reg. 66,577 (1979).

[13] Mid-Louisiana Gas Co. v. Federal Energy Regulatory Comm'n, 664 F.2d 530 (5th Cir. 1981), *vacated and remanded sub nom.* Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co., 103

The rule of law today, as articulated by this Court in *Public Service Commission of New York v. Mid-Louisiana Gas Co.* (*"Mid-Louisiana"*), 103 S. Ct. 3024 (1983), is that the maximum lawful prices established by Congress in the NGPA apply to *all* natural gas production—including old pipeline production.

2. The Commission Proceedings Below

On July 30, 1982, Consolidated filed a rate revision under the PGA provision of its tariff to implement the Fifth Circuit's *Mid-Louisiana* decision, and sought to obtain, among other things, retroactive application of the maximum lawful prices established in the NGPA for company-owned production previously valued on a cost of service basis, *i.e.*, old pipeline production. Consolidated proposed a surcharge on gas sales over a three-year period to recover NGPA prices for its company-owned production for the period December 1, 1978—the effective date of the NGPA—through December 31, 1981. On August 31, 1982, the Commission issued an order accepting Consolidated's proposed surcharge.

S.Ct. 3024 (1983). On August 4, 1980, the Commission issued Order No. 98, in which it promulgated a rule under the Natural Gas Act allowing any pipeline production priced on an area or nationwide rate basis, *i.e.*, "new" pipeline production, to receive the same prices that independent producers received under the NGPA. The Commission also ruled that old pipeline production could not be valued on the basis of the NGPA maximum lawful prices. *See* 45 Fed. Reg. 53,091 (1980). On October 3, 1980, the Commission issued Order No. 102 and denied all applications for rehearing of Order Nos. 58 and 98. *See* 45 Fed. Reg. 67,083 (1980). On that same date, Consolidated and other interstate natural gas pipeline companies petitioned the Fifth Circuit for review of Commission Order Nos. 58, 98, and 102. On December 23, 1981, the Fifth Circuit issued its decision in *Mid-Louisiana* and determined that the maximum lawful prices established under the NGPA apply to *all* production from the effective date of the NGPA—including "old" pipeline production. Petitions for a writ of certiorari to the Fifth Circuit were filed with this Court, and the Court granted the various petitions.

On February 4, 1983, the Commission *sua sponte* issued an order that modified the surcharge approved in the August 31 order. In its February 4 order, the Commission reasoned that Consolidated's NGPA surcharge proposal must be evaluated in the light of the general rate case settlement agreement that covered the period July 1, 1980 through December 31, 1981 (the "1980 rate case" settlement). That settlement agreement resolved cost of service issues as well as certain specified PGA issues. The settlement contained no reference to the pricing of old pipeline production. The settlement did, however, contain a general reservation clause stating that neither the parties to the settlement agreement nor the Commission Staff "shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters *not expressly provided for herein.*" [14] Nonetheless, the Commission held that the 1980 rate case settlement provided for a valuation of pipeline production on a cost of service basis and that Consolidated did not "preserve" its right to seek NGPA pricing for old pipeline production for the period covered by the settlement.[15]

On rehearing, the Commission modified its February 4 order. The Commission acknowledged that the 1980 rate case settlement did *not* specifically provide for cost of service treatment of old pipeline production as the Commission had asserted in the February 4 order; rather, the Commission noted that "[t]he settlement is silent on the issue." [16] Relying upon that silence, the Commission denied Consolidated's July 30, 1982 PGA filing to the extent that it sought retroactive pricing of old pipeline production at NGPA levels for the 18-month period July 1, 1980 through December 31, 1981. On June 2, 1983,

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[14] App. 81a (emphasis added). The Commission approved the 1980 rate case settlement by order dated April 3, 1981.

[15] App. 30a.

[16] App. 39a.

Consolidated petitioned the Fourth Circuit for review of the Commission's orders.

3. The Fourth Circuit's Decision Below

On September 24, 1984, the Fourth Circuit issued its decision in *Consolidated Gas Supply Corporation v. Federal Energy Regulatory Commission*, 745 F.2d 281 (4th Cir. 1984). The court affirmed the Commission's orders and held that Consolidated had forfeited its statutory right to collect NGPA prices for old pipeline production. The court concluded that Consolidated had agreed to price its old pipeline production on a cost of service basis.[17] The court determined that: "[o]ut of 'all of the cost of service issues' the settlement purported to cover, NGPA pricing [of pipeline production] unmistakably was one;" [18] that the issue of the pricing of Consolidated's pipeline production was intended to be resolved by the settlement agreement in the 1980 rate case; [19] and that Consolidated had "discarded" its right to collect NGPA prices for its company-owned production by failing expressly to preserve that right.[20]

Consolidated timely filed a petition for rehearing and suggestion for rehearing in banc. On October 31, 1984, the Fourth Circuit denied Consolidated's petition.

REASONS FOR GRANTING THE WRIT

In *Mid-Louisiana*, this Court unequivocally determined that the statutory prices prescribed by Congress in the NGPA applied to all natural gas production, including pipeline production. By the time that case was decided,

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[17] App. 14a.

[18] App. 14a-15a.

[19] App. 12a, 14a.

[20] App. 20a.

however, the Commission had fashioned a regulatory maze from which no interstate pipeline could successfully emerge. Before the *Mid-Louisiana* decision, the Commission directly precluded interstate pipelines from receiving NGPA pricing for old pipeline production. After the *Mid-Louisiana* decision, the Commission frustrated the implementation of this Court's mandate indirectly by claiming that the same pipeline companies that successfully litigated the right to receive NGPA prices had deliberately—albeit silently—bargained away that right in general rate case settlement agreements negotiated during the pendency of the *Mid-Louisiana* litigation.

As the result of this flouting of this Court's mandate, Consolidated has been deprived of more than $30 million that Congress intended it to receive. Other pipeline companies similarly have been denied NGPA prices under this theory, at a loss of many more millions of dollars.

The Commission's stubborn adherence to its discredited interpretation of the NGPA presents a recurring and vitally important issue in the administration of the NGPA and this Court's interpretation of that statute. It is an issue that warrants swift review by this Court to restore the aims of the national energy policy embodied in the NGPA and to ensure compliance with this Court's *Mid-Louisiana* mandate.

I. The Decisions Below Conflict With This Court's Mandate in *Mid-Louisiana* By Application of an Unlawful Standard Governing the Interpretation of Settlement Agreements

In *Mid-Louisiana*, this Court held that "Congress intended pipeline production to receive first sale pricing" under the NGPA,[21] and that the "exclusion of pipeline production is 'inconsistent with the statutory mandate [and would] frustrate the policy that Congress sought to

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[21] 103 S. Ct. at 3035.

implement'." [22] The *Mid-Louisiana* decision "governs the rights and obligations of the parties," and the express mandate must be "carried out promptly, fairly, efficiently, and without deviation from its letter and spirit." [23] The Commission is thus " without power to do anything which is contrary to either the letter or spirit of the mandate," [24] and the Fourth Circuit, as an inferior court, "has no power or authority to deviate from the mandate issued by" this Court.[25] In a real sense, the decisions below reflect "the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues," [26] even after this Court has instructed otherwise.

The methodology used by the Commission to frustrate the *Mid-Louisiana* mandate was to establish in 1983 a *new* test to be applied to a settlement agreement executed in 1981. That unprecedented test requires that,

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[22] *Id.* at 3037, *quoting* Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981).

[23] Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 541 (8th Cir. 1975), *mod. on reh'g on other grounds*, 529 F.2d 181 (8th Cir., 1976).

[24] City of Cleveland v. Federal Power Commission, 561 F.2d 334, 346 (D.C. Cir. 1977). In denying the motion for stay of its interim regulations on the pipeline production pricing issue, the Commission assured Consolidated of the right to do exactly what the Commission and the Fourth Circuit later precluded it from doing: "[T]he Commission could authorize the collection of revenues denied by this [pipeline production] regulation through surcharges." App. 66a.

[25] Briggs v. Pennsylvania R. Co., 334 U.S. 304, 306 (1948). *See, e.g.*, Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 428 (1978); Cascade Natural Gas Corp. v. El Paso Natural Gas Co.. 386 U.S. 129, 136 (1967); United States v. E.I. DuPont de Nemours and Co., 366 U.S. 316, 325 (1961); Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895).

[26] Food Marketing Inst. v. Interstate Commerce Comm'n, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

even where a settlement agreement contains a general reservation, a pipeline must *also specifically* reserve the right to collect NGPA prices for its production—although that right was never an issue in the general rate case.[27] Because the Commission announced the test only after it had failed to persuade the courts of its interpretation of the NGPA, and only after the Commission approved the 1980 rate case settlement, it is not at all surprising that the test is impossible to pass.[28]

As this Court stated in *Morgan v. United States*, "[t]hose who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." [29] The decisions below thus flout the principle that "[t]he law will not tolerate this sort of after-the-fact, in fact retroactive, imposition of standards." [30]

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[27] Historically, the general rule has always been that a general reservation clause, such as the one that existed in the 1980 rate case settlement, would protect all parties, including the Commission, from an unintentional waiver of any right *not* specifically settled. *See infra* note 37.

[28] This case is one of several that originate from the Commission's effort to circumvent the *Mid-Louisiana* mandate and to deprive the litigants in the *Mid-Louisiana* proceeding of that which this Court held they were entitled. *See* Kentucky-West Virginia Gas Co., 21 F.E.R.C. (CCH) ¶ 61,251 (1982), *appeal docketed*, No. 82-4594 (5th Cir. Dec. 30, 1982); Mid-Louisiana Gas Co., 21 F.E.R.C. (CCH) ¶ 61,072 (1982), *appeal docketed*, No. 82-4470 (5th Cir. Nov. 11, 1982); National Fuel Gas Supply Corp., 27 F.E.R.C. (CCH) ¶ 61,111 (1984), *reh'g denied*, 28 F.E.R.C. (CCH) ¶ 61,012 (1984), *appeal docketed*, No. 84-1246 (D.C. Cir. June 15, 1984); El Paso Natural Gas Co., 20 F.E.R.C. (CCH) ¶ 61,443 (1982), *appeal docketed*, No. 82-2172 (D.C. Cir. Sept. 30, 1982).

[29] 304 U.S. 1, 18-19 (1938).

[30] United Gas Pipe Line Co. v. Federal Energy Regulatory Comm'n, 597 F.2d 581, 586 (5th Cir. 1979), *cert. denied*, 445 U.S. 916 (1980).

Quite apart from the Commission's misconstruction of the settlement, Consolidated did in fact preserve its right to collect NGPA prices under the terms of its Commission-approved tariff.[31] As described above, during the pendency of the proceeding in the 1980 rate case, and at *all* times since December 1, 1978, Consolidated has had in effect Commission-approved tariff language that defined purchased gas costs to include pipeline production that *qualifies* for area, nationwide, or statutory rates. In spite of this, and because of its unlawful interpretation of the NGPA, the Commission refused to permit Consolidated to include in its PGA amounts attributable to old pipeline production. Thus, only the Commission's dis-

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[31] Consolidated's tariff is the document required to be filed with the Commission setting forth the terms and conditions of Consolidated's service, including rate terms. The tariff is a part of the service agreements that Consolidated has with each of its customers. Thus, the tariff governs the relationship between the pipeline and its customers, and between the pipeline and the Commission. The Commission defines a "tariff" as a published volume of all effective rate schedules, general terms and conditions, and each form of service agreement under which a product of service will be provided. 18 C.F.R. § 154.14 (1984).

One of the essential components of Consolidated's tariff is the purchased gas cost adjustment ("PGA") clause. As discussed above, Consolidated elected to recover changes in its purchased gas costs through the PGA. Pipelines that elect to recover purchased gas costs through their PGA are prohibited from including changes in gas costs in general rate filings.

The PGA is thus one of two mutually-exclusive methods for a natural gas pipeline to recover or return to customers changes in the cost of purchased gas. *See supra* note 7 and accompanying text. Although for many years before the 1980 rate case period the Commission allowed pipelines to choose between recovering those costs through the PGA or through general rate cases under section 4 of the Natural Gas Act, during the 1980 rate case period, the Commission's regulations explicitly required that changes in gas costs could not be reflected in general rate cases for those pipelines electing to recover purchased gas costs through the PGA. *Id.* The PGA is thus the *exclusive* method to recover gas costs except for pipelines that obtain a waiver.

credited interpretation of the NGPA prohibited Consolidated from recovering the costs of pipeline production through its Commission-approved PGA. Had the Commission properly interpreted the NGPA, Consolidated would have recovered NGPA prices for pipeline production from December 1, 1978, through its PGA tariff.

The decision below avoided this problem by making the assumption that a general rate case settlement controls all aspects of a pipeline's rates, including gas cost matters. But a settlement agreement is not the sole determinant of rates for any period. Consolidated's rate case settlement did not in any way alter the tariff authority that operated during the period of the 1980 rate case.[32] That fact is amply demonstrated by the failure of any party to the 1980 rate case settlement to contend that the agreement compromised the issue of the pricing of Consolidated's old pipeline production and thus precluded Consolidated from implementing the *Mid-Louisiana* mandate through its surcharge proposal.

The decision below, however, summarily dismissed any consideration of the effect of Consolidated's tariff as "obscure" and as a "strained attempt" to support Consolidated's right to NGPA prices for pipeline production.[33] That disregard of Consolidated's tariff is tanta-

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[32] To support the conclusion that Consolidated "discarded" its right to collect NGPA prices, the court pointed to the introductory language of the 1980 rate case settlement agreement. App. 12a. The court stated that the 1980 rate case settlement resolved "all of the cost of service issues and the PGA issues . . . in Docket No. RP80-61 . . ." The language deleted by the Fourth Circuit's ellipsis, however, describes "the PGA issues" resolved as those "described in Article VII" of the 1980 rate case settlement agreement. App. 67a. Article VII has nothing whatsoever to do with the pricing of old pipeline production . Article VII instead relates to the arithmetical method of computing the unit purchased gas cost adjustment. App. 74a.

[33] App. 18a n.21.

mount to the disregard of a statute, for "a tariff, required by law to be filed, is not a mere contract. It is the law." [34]

Congress authorized NGPA prices for pipeline production; this Court reaffirmed that authorization; and at all times since the effective date of the NGPA's pricing provisions, Consolidated has had a Commission-approved tariff that permits the collection of NGPA prices for *all* pipeline production.

II. The Decisions Below Conflict with this Court's Mandate in *Mid-Louisiana* By Means of an Unlawful Post Hoc Rationalization

In upholding the Commission's application of the new "preservation" requirement to Consolidated, the Fourth Circuit ignored the Commission's specific finding that the 1980 rate case settlement was silent on the issue of NGPA pricing for old pipeline production. Instead, the court made a post hoc determination that the settlement was *not* silent. The effect of that determination was to countenance the subversion of this Court's mandate in *Mid-Louisiana* and to arrogate to the Commission the authority to decide whether to implement the congressional policy mandated by this Court.

The Commission's conclusion that Consolidated had forfeited its right to collect NGPA prices rested upon the finding that the 1980 rate case settlement was silent on the issue of NGPA prices for old pipeline production. The Commission expressly found that "[t]he settlement is silent on the issue." [35]

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[34] Carter v. American Telephone & Tel. Co., 365 F.2d 486, 496 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967). *See also* United States v. Associated Air Transports, Inc., 275 F.2d 827, 833 (D.C. Cir. 1960).

[35] App. 39a.

Disregarding the factual finding by the Commission on the silence issue in this case, the Fourth Circuit determined that the settlement expressly compromised the issue of the pricing of Consolidated's old pipeline production,[36] and thus avoided addressing the legal effect of that silence, *viz.*, the extent to which a forfeiture of the valuable statutory right to NGPA prices may be ascribed to silence. The Court apparently made the post hoc rationalization because the law is clear: no forfeiture could be ascribed to silence.[37]

The Commission itself concedes that the waiver of an NGPA right must be done knowingly.[38] Additionally, in a recent Commission decision on the interpretation of a settlement agreement, the Commission took a position opposite of that taken here. The Commission held that where there is no "settlement language establishing pro-

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[36] *See supra* notes 17-20 and accompanying text.

[37] Silence cannot constitute a waiver of a statutory right. A waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). As the Fourth Circuit and the Fifth Circuits observed, "[a] waiver in any kind of a case, is an intentional relinquishment of an existing right." Van Bourg v. Nitze, 388 F.2d 557, 565 (D.C. Cir. 1967), *quoting* Williams v. Alabama, 341 F.2d 777, 780 (5th Cir. 1965).

The Fourth Circuit also ignored an integral provision of the 1980 rate case settlement. Article XIV of that agreement provides: "[N]either Consolidated, nor the Commission, its staff, or any other party to these proceedings shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein. App. 81a. Full effect must be given to all the terms of the settlement agreement—including Article XIV. *See, e.g.*, City of Chicago v. Federal Power Comm'n, 385 F.2d 629, 640 (D.C. Cir. 1967), *cert. denied sub nom.* Public Serv. Comm'n of Wisconsin v. Federal Power Comm'n, 390 U.S. 945 (1968). Plainly, under Article XIV, to the extent that no specific article addressed the pricing of Consolidated's old production—and none did—that issue *was* preserved.

[38] *See* Arkansas Louisiana Gas Co., 28 F.E.R.C. (CCH) ¶ 61,005 (1984).

cedures for protest of or investigation of the reasonableness of settlement minimum bill payments," it would

> [c]onclude that parties must be considered free to challenge any and all charges arising under the settlement. The settlement in no way establishes or purports to establish a limitation or [sic] the opportunity of parties to exercise their rights under the Natural Gas Act . . . . *Where the settlement is silent on the matter, those rights are not extinguished.*[39]

The failure of the decision below to adhere to the factual findings of the Commission not only frustrate the *Mid-Louisiana* mandate, but violates this Court's injunction against post hoc rationalizations to support administrative conclusions.[40] The post hoc rationalization upon

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[39] Columbia Gas Transmission Corp. v. Tennessee Gas Pipeline Co., 29 F.E.R.C. (CCH) ¶ 61,203 at p. 61,408 (1984) (emphasis added). Similarly, in *Texas Gas Transmission Corp. v. FPC*, 441 F.2d 1392 (6th Cir. 1971), the Commission argued—in complete contradistinction to the decision below—that silence in a settlement agreement did not preclude implementation of a policy that was not finally settled at the time of the agreement. The court upheld the Commission's construction: "[T]he agreement's silence on the disposition of such refunds is not to be interpreted as an indication that the Commission waived all rights to require such refunds. . . ." *Id.* at 1396.

[40] *See, e.g.*, Securities Indus. Ass'n v. Board of Governors, 104 S. Ct. 2979, 2983 (1984); Industrial Union v. American Petroleum Inst., 448 U.S. 607, 631 n. 31 (1980); Federal Power Comm'n v. Texaco, Inc., 417 U.S. 380, 397 (1974); Federal Trade Comm'n v. Sperry and Hutchison Co., 405 U.S. 233, 245-46 (1972); Investment Co. Inst. v. Camp, 401 U.S. 617, 628 (1971); Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 419 (1971); NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 444 (1965); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); SEC v. Chenery Corp., 318 U.S. 80, 87 (1943). In fact, even where the evidence in the record combined with the reviewing court's understanding of the law is enough to support the order, the reviewing court may not uphold the order unless it is sustainable on the agency's findings

which the decisions below are based only perpetuate the error that resulted from the Commission's interpretation of the NGPA—an error that this Court corrected in the *Mid-Louisiana* decision.

CONCLUSION

Since the enactment of the NGPA in 1978, Consolidated has asserted its right to collect NGPA prices for all of its own production. At every turn, the Commission has tried to prevent Consolidated from doing so. This Court should put an end to obstructionist Commission actions, and should exercise its supervisory powers to compel compliance with the letter and spirit of the *Mid-Louisiana* mandate.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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and for the reasons stated by the agency. *See* Saylor v. United States Dept. of Agriculture, 723 F.2d 581, 582 (7th Cir. 1983). Additionally, section 19(b) of the Natural Gas Act provides that the factual findings made by the Commission, if supported by substantial evidence, "shall be conclusive." 15 U.S.C. § 717r(b) (1982).

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1546(L)

CONSOLIDATED GAS SUPPLY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PUBLIC SERVICE COMMISSION OF
STATE OF NEW YORK,
Intervenor.

No. 83-1499

CONSOLIDATED GAS SUPPLY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PUBLIC SERVICE COMMISSION OF
STATE OF NEW YORK,
Intervenor/P.

On Petition for Review of Orders of
Federal Energy Regulatory Commission

Argued: March 6, 1984 Decided: September 24, 1984

Before PHILLIPS, MURNAGHAN, and ERVIN, Circuit Judges.

John E. Holtzinger, Jr. (John T. Stough, Jr., Kevin J. Lipson, Morgan, Lewis & Bockius, David E. Weatherwax, Stephen E. Williams on brief) for Petitioner; Thomas E. Hirsch, III (David E. Blabey, General Counsel, Richard A. Solomon for Intervenor Public Service Commission of the State of New York; Stephen R. Melton, Acting General Counsel, Jerome M. Feit, Solicitor on brief) for Respondent.

MURNAGHAN, Circuit Judge:

Despite a commonly displayed attitude that focuses on the role of persons sitting on the bench, *i.e.*, judges, arbitrators or agency adjudicators, those persons are by no means the only ones to take decisions in litigated matters. On the contrary, resolution is not infrequently accomplished by the party litigants themselves through agreement and settlement before, during or even after litigation. In the achievement of such settlement, the parties are, or should be, encouraged. For a long time it has been a commonplace of those charged with resolving disputes that *interest reipublicae ut sit finis litium.*

As in most legal undertakings, precision of meaning, which fosters in turn a need for precision of language, has proven essential to the achievement of settlement. Otherwise, a case that has been compromised with the intention that it be permanently interred is apt, following a change of circumstances, to undergo a full-scale resurrection. In large measure, people remain litigious, and many are not averse to seizing any second chance they think may be open to them, if it means an opportunity for better results. The desire to ensure that there will be no disturbance of R.I.P. status for settled cases has led to colorful language in releases and other settlement documents, acknowledging, as they not infrequently do, the abandonment of claims "from the beginning of the world until the date hereof," when a more modest reference back to 1492, 1066 or even 476 would probably ensure sufficient protection.

Of course, the prospect of a settlement's coming undone is manifestly less when it has been entered under circumstances that prevent the parties from ever learning what the eventual result of full litigation would have been. Such is the case, for example, in countless vehicle accident suits, for settlement in such instances usually eliminates any basis for determining what the judge or jury would have decided as to the issue of fault, or as to the amount of appropriate damages.

There are, however, occasions upon which the wish to purchase peace is compelling enough for the parties to compromise claims that are related to other collateral, ongoing disputes that will ultimately, despite any settlement, be resolved one way or the other. Such resolution will disclose which of the settling parties was abstractly right, which would win or lose, and hence which will have gained by settling and which will have lost.[1] Nevertheless, in return for other advantages a party may be willing to give up the fight with respect to a particular collateral, as yet undecided issue, as its resolution would affect the question directly at hand.

The case now before us presents such an ongoing, collateral matter and a settlement that the parties mutually agree did finally dispose of a number of contested issues. The question confronting us is whether general language in the settlement documents likewise extended to one crucial, contested issue, or whether the language of settlement only controlled if one of the parties was victorious in the collateral matter. It is earnestly contended before this court that the issue that was apparently settled was actually intended by the parties to await further developments in the way of a decision in a collateral matter which, if favorable to one of the par-

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[1] This conclusion does not suggest that the party who gave up something by settling, when he might have done better by fighting to the bitter end, is necessarily a loser. Time is often money, and relief from uncertainty too may have a value.

ties, would lead to further specialized negotiations or litigation. In short, we must decide whether the settlement was intended by the parties to be complete or only partial. It is, of course, elementary that an unambiguous document controls, unaffected by contentions of one of the parties that he, she or it meant something else. *See Skyline Corp. v. NLRB*, 613 F.2d 1328, 1334 (5th Cir. 1980) (as a general rule, "a mistake by one party to an agreement, where it is not induced by acts of the other party, will not constitute grounds for relief") (citation omitted).

After that spate of generalities, we turn to the particular facts of the case before us. Consolidated Gas Supply Corp. ("CGS"), an interstate natural gas pipeline company, has had more than one occasion to lock horns with the Federal Energy Regulatory Commission ("FERC"), and no doubt will have other opportunities in the future to do so. Proper rates to be charged by CGS to its customers is the common focus of such disputes with justness and reasonableness constituting the tests for allowable rates. *See* 15 U.S.C. §§ 717c(a) and 717d (a); and 15 U.S.C. § 3314. A consideration in a number of prior disputes has been the applicability of a FERC policy requiring a pipeline company such as CGS to structure resale prices based on the "cost of service method" for "old" gas, *i.e.*, the gas emanating from wells that have existed for some time.[2] The FERC's position, up until June 28, 1983, the date a decisive Supreme Court opinion appeared,[3] has been that computations should be made exclusively with reference to the

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[2] "Old gas" has been defined as production from wells drilled before January 1, 1973 on leases acquired before October 8, 1969. *See Pipeline Production Area Rate Proceeding (Phase I)*, 42 F.P.C. 738, 745 (1969), *aff'd sub nom., City of Chicago v. FPC*, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

[3] *Public Service Comm'n of New York v. Mid-Louisiana Gas Co.*, —— U.S. ——, 103 S. Ct. 3024, 51 U.S.L.W. 5030 (U.S. June 28, 1983).

actual costs associated with the opening and maintenance of wells producing "old" gas. Since the costs associated with producing gas from more recently developed wells are higher, the efforts of CGS (and doubtless of others in a similar position) have been directed at having a uniform area or nationwide approach to pricing gas,[4] regardless of whether in any particular case the gas is "old" or "new." The resulting mix of "new" gas costs with those of "old" gas would in general produce higher gas prices.

The passage into law of the Natural Gas Policy Act of 1978 ("NGPA") (enacted November 9, 1978 and effective December 1, 1978), 15 U.S.C. §§ 3301 *et seq.*, presented a complicating factor. Prices under the NGPA were to be calculated on the basis of costs associated with all gas production, including both "old" gas and "new." *See Public Service Commission of New York v. Mid-Louisiana Gas Co.*, —— U.S. ——, 103 S. Ct. 3024, 51 U.S.L.W. 5030 (5-4 decision) (June 28, 1983). In respects here significant, the Supreme Court affirmed the substance of a decision of the Fifth Circuit rendered on December 23, 1981, which addressed this facet of NGPA pricing. In *Mid-Louisiana, vacating and remanding Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530 (5th Cir. 1981), the Supreme Court held that the NGPA "maximum rates pricing" approach did apply to "old" gas produced by interstate pipelines. CGS was a party to the *Mid-Louisiana* case.

During the interval between November 9, 1978 and June 28, 1983, however, the FERC maintained the position that a "cost of service" approach, measured by the actual costs of producing the "old" gas, should continue to be used in the case of most sales by interstate pipelines despite the enactment of NGPA. *See* FERC Orders

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[4] Such an approach would allow interstate pipeline companies like CGS to charge those rates that independent producers are permitted to charge for sales of comparable gas.

No. 58, 44 Fed. Reg. 66,577 (issued Nov. 14, 1979); No. 98, 45 Fed. Reg. 53,091 (issued Aug. 4, 1980), and No. 102, 45 Fed. Reg. 67,083 (issued Oct. 3, 1980.)[5] The administrative dream was not finally shattered until the Supreme Court rendered its decision on June 28, 1983. Under the circumstances, however, as to *open* matters, the FERC had already regarded itself as "obligated to implement the mandate" of the Court of Appeals for the Fifth Circuit, and had commenced prospective application of the *Mid-Louisiana* decision even while review in the Supreme Court was pending.[6]

Against that background, we must divine the parties' intent when they entered two settlements, one developed under Docket No. RP79-22 (consolidated with other docket items) and addressing pricing for the period December 1, 1978 through June 30, 1980, and the other Docket No. RP80-61 dealing with pricing for the period from July 1, 1980 through December 31, 1981. We note that CGS applied on December 29, 1978 for general rate increases, seeking application of the NGPA pricing approach ultimtely validated in *Mid-Louisiana*. Anticipating FERC rejection, however, CGS also submitted an alternate tariff sheet figured on the basis of the "most of service" method, *i.e.*, the one that used "old" costs in

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[5] Specifically, Order No. 98, 45 Fed. Reg. 53,091 (issued Aug. 4, 1980) provided that "sales of natural gas by pipelines or distributors are not first sales, and thus not subject to NGPA prices, unless the gas is comprised exclusively of production volumes of natural gas from identifiable wells, properties or reservoirs that are owned by the pipeline or distributor. Therefore, sales of volumes of interstate pipeline production that are commingled with purchased gas prior to sale remain subject to ["old" gas pricing]."

[6] Accordingly, for periods after December 31, 1981, *i.e.*, a date almost immediately after the Fifth Circuit decision in *Mid-Louisiana*, the FERC allowed CGS to employ NGPA "maximum cost" pricing, but provided that the pricing would be subject to refund should *Mid-Louisiana* be reversed or modified by the Supreme Court. *See generally Consolidated Gas Supply Corp.*, 22 F.E.R.C. (CCH) ¶ 61,120 at 61,182 n.4 (Feb. 4, 1983).

pricing production. The FERC rejected the new approach, and opted instead for the tariff sheet reflecting the "cost of service" approach.

A settlement of seven pending rate cases and one certificate case was proposed by CGS on June 22, 1979. It suggested that the proceedings regarding pricing for pipeline production be terminated without prejudice to the right of any party to seek rehearing and court review of the applicability of the NGPA approach.[7] The tariff sheet employing the "all production" approach based on the NGPA was rejected by the FERC in its letter order of August 2, 1979, and instead the alternate tariff sheet with pricing on the "cost of service" basis was accepted. The settlement agreement was certified to the FERC by CGS on August 16, 1979 and was approved by the FERC on November 16, 1979.[8] CGS' application for rehearing on the NGPA pricing issue was formally denied on November 19, 1980, after the FERC had promulgated formal regulations excluding much of "old" pipeline production from NGPA pricing. Following the August 2, 1979 letter order rejecting NGPA pricing, CGS had exercised its explicitly reserved right to take the matter to court, thereby raising, as Docket No. 79-1546, one of the controversies we here undertake to resolve.

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[7] Article V of the "Stipulation and Agreement" provided:

> The treatment of pipeline production in Docket Nos. RP78-52 and RP79-22 shall be an issue reserved for hearing and Commission decision which decision shall be made on the basis of the hearing record or any subsequent settlement agreement. . . . This agreement to reserve the pipeline production issue in Docket Nos. RP78-52 and RP79-22 shall not affect any party's right to seek rehearing, stay, and court review as to the applicability of the NGPA to such production and the validity of the Commission's rules, regulations, and orders thereunder.

[8] The rates proposed in RP79-22 became effective July 1, 1979.

The next relevant step in litigation was CGS' filing on July 30, 1982 of a proposed tariff change related to the purchased gas cost adjustment permitted in its tariff.[9] The objective was to obtain *Mid-Louisiana* treatment retroactively, for purposes of determining maximum lawful prices. On August 31, 1982, *i.e.*, after the Fifth Circuit decision in *Mid-Louisiana* but prior to the Supreme Court ruling, the FERC did order the filing of CGS proposed tariff sheets, permitting them to become effective September 1, 1982, but subject to refund. A surcharge over a three-year period was proposed by CGS, to permit it to recover the differences that accrued during the December 1, 1978 through December 31, 1981 period, between what NGPA pricing would have yielded and what the "cost of service" method had actually produced. The FERC's acceptance of the proposed surcharge was made subject to the outcome of another proceeding (Docket No. RP82-64-000) in which CGS initially sought and, again subject to possible refund, obtained prospective application of NGPA pricing for "old" pipeline production. *See generally Consolidated Gas Supply Corp.*, 22 F.E.R.C. (CCH) ¶ 61,120 at 61,179 (Feb. 4, 1983).

Despite these multiple filings and carefully constructed proposals, however, on February 4, 1983 the FERC acted on its own accord to modify the order of August 31, 1982.[10] It directed that the impact of settlement agreements entered between CGS and the FERC for the periods a) July 1, 1978 through June 30, 1980 and b) July 1, 1980 through December 31, 1981 be taken into ac-

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[9] 18 C.F.R. § 154.38(d)(4) (1983) provides that "[a] natural gas pipeline company may flow through changes in its cost of purchased gas pursuant to a purchased gas adjustment clause (PGA clause)," with such charges recovered separately from general rate charges.

[10] *Consolidated Gas Supply Corp.*, 22 F.E.R.C. (CCH) ¶ 61,120 (Feb. 4, 1983).

count.[11] The settlement agreement for December 1, 1978 through June 30, 1980 was recognized by the FERC as having preserved the right of CGS "to make retroactive collection of [NGPA] costs. . . ." *Id.* at 61,181. Hence, subject to further proceedings in *Mid-Louisiana* designed to ascertain the trigger-point for NGPA pricing along the gas marketing system, the decision by the FERC with respect to the period December 1, 1978 through June 30, 1980 was favorable to CGS and is affirmed by us.

By contrast, there were substantial differences in the language appearing in the settlement agreement covering the period July 1, 1980 through December 31, 1981, which differences led the FERC to conclude that no reservation of "any right to assert NGPA treatment for pipeline production" had been made in that settlement. *Id.* Thus, the FERC's modifying order of February 4, 1983 denied to CGS the right retroactively to use NGPA pricing for the time span between July 1, 1980 and December 31, 1981.[12]

The practice has not been uncommon for a pipeline company and the FERC to negotiate a settlement once a rate increase request has been set for hearing. When such a settlement has been reached between the company and the FERC staff, it must still win the approval of the Commission itself, which approval is granted only after an opportunity for comment has been afforded to interested persons. To gain final approval, the Commission must be satisfied that it is "fair and reasonable and in the public interest." 18 C.F.R. § 385.602(g)(3) (1983).

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[11] Although the relevant dates were initially misstated in the FERC's ruling of February 4, 1983, the errors were corrected by subsequent modification. *See Consolidated Gas Supply Corp.*, 23 F.E.R.C. (CCH) ¶ 61,018 at 61,047 (Apr. 6, 1983).

[12] The February 4, 1983 order, as modified on April 6, 1983, was assigned Docket No. 83-1499 on appeal by CGS to this court.

As noted above, the document embodying the settlement covering the period between December 1, 1978 and June 30, 1980, RP79-22, was forwarded to the FERC by counsel for CGS by letter dated June 22, 1979, and became effective with formal FERC approval on November 16, 1979. The significance of the earlier RP79-22 settlement agreement lies in the clear specificity with which CGS reserved its right to seek relief, at a future time (no doubt dependent on the ultimate outcome of *Mid-Louisiana*), through application of the NGPA "all cost" approach to transactions occurring between December 1, 1978 and June 30, 1980.[13] Before this court, the FERC has relied on language differences in the second settlement agreement covering July 1, 1980 through December 31, 1981 (Docket No. RP80-61), which it contends dictate the application of a general principle that broad changes in phraseology signify differences in meaning.[14] While as a generality that may be true, the pos-

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[13] In Article V of the RP79-22 settlement, termed "Pipeline Production," it was provided that all pre-1978 dockets were declared terminated, and CGS' request for relief as to them was withdrawn. However, for RP79-22, it was made clear that treatment of pipeline production:

> shall be an issue reserved for hearing and Commission decision which decision shall be made on the basis of the hearing record or any subsequent settlement agreement. . . . This agreement to reserve the pipeline production issue in Docket Nos. RP78-52 and RP79-22 shall not affect any party's right to seek rehearing, stay, and court review as to the applicability of the NGPA to such production and the validity of the Commission's rules, regulations, and orders thereunder.

[14] It is not to be ignored that careful, explicit language of reservation is to be found throughout RP79-22, the earlier-prepared and submitted settlement agreement. The absence of similar language in the later RP80-61 settlement is more damaging to the position of CGS than if the two agreements had been chronologically reversed. Such is particularly the case when it is realized that, in two other subsequent settlement agreements, RP81-80 and RP82-115, CGS went to considerable pains to make explicit the reservation of its right to claim NGPA pricing for the periods there involved.

sibility also exists that alterations in the circumstances that are addressed, or a simple desire to demonstrate versatility in expressing the same idea—not a variation in intent—may underlie changes in the words employed.

On January 30, 1980 the FERC ordered that "costs of old pipeline production should be based on cost of service. . . ." *See generally Consolidated Gas Supply Corp.*, 22 F.E.R.C. ¶ 61,120 at 61,181 (Feb. 4, 1983). The order rejected the tariff sheet submitted by CGS that sought to apply NGPA pricing for pipeline production. A settlement agreement in RP80-61, governing the period between July 1, 1980 and December 31, 1981, was filed on February 6, 1981, certified to the FERC on March 5, 1981, and approved by the Commission on April 3, 1981.[15] *See Consolidated Gas Supply Corp.*, 15 F.E.R.C. (CCH) ¶ 61,006 (Apr. 3, 1981). The FERC later specifically determined that the rejection of NGPA

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[15] It is enough to suggest massive failure of communication on the part of several different lawyers for CGS to learn that on January 30, 1981, seven days before the filing of the RP80-61 settlement agreement, a PGA rate change filing was made in Docket No. TA81-1-22-002, with a transmittal letter that included the following language:

> The filing in this [PGA] proceeding on the basis of the inclusion of old pipeline production on a cost-of-service basis is without prejudice to Consolidated's position that old pipeline production is entitled to NGPA treatment and the outcome of the court proceedings. Consolidated has omitted [an] alternate filing to avoid the burden of Commission rejection of a tariff sheet, to be followed by another application for rehearing and petition for court review. Consolidated reserves the right to make collections based on NGPA treatment for old pipeline production.

It cannot be disputed, however, that the language we are construing in RP80-61 is that of a subsequently filed, integrated agreement, not that appearing in an earlier document filed in a different connection. If a lawyer's lapse has placed CGS in its present position, that does not justify our departure from established tenets of contract construction, tenets with which the lawyer must have been familiar.

pricing had not been appealed by CGS, nor had the issue been reserved by the settlement agreement. *See Consolidated Gas Supply Corp.*, 22 F.E.R.C. (CCH) ¶ 61,120 at 61,181 (Feb. 4, 1983).

Formal approval of the settlement agreement accordingly was after the *Mid-Louisiana* case had first been instituted in the Fourth Circuit on October 6, 1980, and transferred to the Fifth Circuit on December 2, 1980, but prior to the December 23, 1981 decision by the Fifth Circuit and *a fortiori* before the Supreme Court spoke on June 28, 1983. The RP80-61 settlement agreement, therefore, was negotiated while the applicability of the NGPA pricing method to "old" gas was very much in dispute and hotly contested by the parties.

A direct comparison of specific sections of the settlement agreements in Docket Nos. RP79-22 and 80-61 serves to illuminate the meaning of both. The "Stipulation and Agreement" covering Docket No. RP79-22 and associated docket items for the period December 1, 1978 through June 30, 1980 commenced with the statement that the intent was to resolve "all of the issues now pending" in the rate proceedings in certain of the docket items other than RP79-22 (all of which antedated the enactment of the NGPA), as well as "certain limited issues" in RP79-22. On the other hand, the RP80-61 "Stipulation and Agreement Resolving Cost of Service and PGA Issues" was not similarly restricted. It expressed the intent as "resolution of all of the cost of service issues and the PGA issues . . . in Docket No. RP-80-61. . . ." Thus, at the outset, the earlier agreement spoke in terms of resolution of only "certain limited issues," while the later one, the interpretation of which has fallen to our lot, described its mission as resolution of "*all* of the cost of service issues." [16] (Emphasis supplied).

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[16] CGS makes an argument based on acknowledgments by the FERC in two documents issued in 1979 that CGS could, should it

Subsequently, however, in the section headed "Procedural Background," RP80-61 states that "the participants have reached this unanimous Stipulation and Agreement which resolves cost of service and purchased gas adjustment clause issues, except for certain reserved issues *as specified in this agreement.*" [17] (Emphasis supplied). We must, perforce, address the question whether the reservations "specified" or "contained" in the RP80-61 settlement agreement include the right retroactively to seek NGPA maximum pricing after *Mid-Louisiana* had been finally decided.

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ultimately prevail in *Mid-Louisiana*, collect through surcharges differentials in past pricing between "cost of service" and NGPA pipeline production techniques. The latter of those two acknowledgments occurred on June 29, 1979. Over a year and one-half later came the RP80-61 settlement agreement. It resolved "all of the cost of service issues," and whether "old" gas should be priced on a "cost of service" basis certainly was a continuing, unresolved issue between the parties. By representing in 1979 that the issue was still generally open, and by agreeing in 1981 that, as to a fixed segment of the time frame involved, it was resolved, the FERC was filling a classic role in dispute resolution.

In like vein, CGS points to language in its December 28, 1979 rate filing in RP80-61, which read:

> Consolidated is filing the proposed tariff sheets consistent with its position that all pipeline production qualifies for pricing at NGPA rates and the alternative tariff sheets consistent with Consolidated's understanding of Commission policy that only pipeline production previously priced the same as independent producer production qualifies for pricing at NGPA rates.

Again, that language constitutes only a preliminary to the integrated contract that came into being with final Commission approval on April 3, 1981. The making of the point earlier, only to exclude it later from the agreement itself, cuts against the position of CGS rather than supports it.

[17] Subsequently, under the heading "Cost of Service" (Article II), there is reference to rates set forth in the settlement agreement to be effective July 1, 1980 through March 31, 1981, "subject to the reservations contained herein. . . ."

We find that the pricing technique employed in the RP80-61 settlement agreement is the "cost of service" approach favored by the FERC. Nowhere in the RP80-61 settlement agreement does reservation language specific to NGPA pricing appear. As the FERC in its "Order Modifying Prior Commission Order" of February 4, 1983 has observed, the pipeline production pricing issue is not addressed at all in the body of the settlement agreement. In fact, it appears that "the rates in the settlement agreement were supported by various costs, including costs associated with the valuation of Consolidated's old production on a cost-of-service basis." *Consolidated Gas Supply Corp.*, 23 F.E.R.C. ¶ 61,018 at 61,047 (Apr. 6, 1983). Since the proper pricing of "old" gas was a crucial issue in RP80-61, any reservation of rights should have been specifically enunciated in the settlement.

In this regard, CGS freely admits in its Reply Brief that "[d]uring the term covered by the 1980 rate case settlement, however, Consolidated did value its pipeline production on a cost of service basis, but only because the Commission required it to do so." Also, in light of the developed positions taken at the time by the FERC on the one hand and by pipeline companies on the other, the FERC could hardly have operated on any other assumption. Indeed, pricing under the settlement agreement must have proceeded on the "cost of service" basis, or else there would have been no occasion for the lawsuit to have been instituted. It follows rather inexorably that such a "cost of service" issue was pending before the FERC and was intended to be resolved by the very introductory language of the RP80-61 settlement agreement.[18] Out of "all of the cost of service issues" the

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[18] As an "aid" to interpretation of the mutually negotiated settlement agreement, CGS points to its treatment of PGA applications. One submitted on February 4, 1980 (effective by Commission approval on March 1, 1980) had contained no reservation of the right

settlement purported to cover, NGPA pricing unmistakably was one.

The text of the settlement in RP80-61 itself reveals that CGS well knew how to make explicit reservations re-

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to claim any entitlement to NGPA pricing. However, the settlement already long since approved in RP79-22 did reserve the right to claim NGPA prices for the period March 1, 1980 through June 30, 1980. CGS naturally has no quarrel with that result, and is satisfied to accept the operation of the explicit language of reservation in the RP79-22 settlement governing the period.

Two subsequent PGA applications on August 1, 1980 (effective September 1, 1980) and January 30, 1981 (effective March 1, 1981) related to a period after that covered by the settlement in RP79-22. CGS then did assert in its transmittal letters that the use of the "cost of service" approach was without prejudice to its right to claim NGPA pricing. The applications do not, however, dictate the agreement. Otherwise, there would simply be no negotiations, and the gas pipeline companies would have it all their own way. Unlike the *settlement* in RP79-22, the settlement ultimately approved in RP80-61—*i.e.*, the operative *agreement*—plainly did not include language of reservation on the cost of service issue. While CGS is no doubt dissatified at this point to accept the operation of the terms of settlement finally adopted in RP80-61, such must be the result. CGS may not claim that the earlier, unilateral statements made in letters of transmittal control the language ultimately adopted in the RP80-61 settlement document itself. Indeed, it seems questionable how CGS is helped by these examples, for the settlement approved on April 3, 1981 in RP80-61 did not contain a reservation that CGS twice previously (within the past eight months) had demonstrated that it knew how to articulate.

In short, unilateral statements of position uttered before an integrated contract is entered do not become part of a contract when the party arguing for their inclusion was unable to secure the adoption of the statements in the language of the contract. *See G. J. Langenderfer v. Midrex Corp.*, 660 F.2d 523, 525 (4th Cir. 1981) ("parol evidence cannot be admitted to establish a provision nowhere present in the contract"); *Kawa Leasing, Ltd. v. Yacht Sequoia*, 544 F. Supp. 1050, 1066 (D. Md. 1982) (parol evidence rule proscribes the admission of oral evidence when parties have intended that a written agreement cover all the subjects of their negotiations); and *Restatement (Second) of Contracts* § 213 (1979).

garding selected issues, but that the subject of NGPA prices was not one of the issues so selected. Article III of the agreement, captioned "Rate of Return," called for application of a rate of return on common equity to be determined in *Consolidated Gas Supply Corp. v. FERC*, 4th Cir. No. 80-1219, then pending with respect to the rate of return decided by the FERC to be effective with respect to the tariffs at issue in RP79-22. *See Consolidated Gas Supply Corp. v. FERC*, 653 F.2d 129 (4th Cir. 1981). Article IV, titled "HIOS Separation Charges," [19] speaks of components of the HIOS transportation rates and explicitly stipulates that the "issue be reserved and tied to the outcome of a similar issue in . . . Docket No. RP78-94 . . . ."

In addition, Article VI of the RP80-61 agreement speaks of a cost allocation agreement as having been unanimously settled, and simultaneously filed, which, upon approval, would resolve GSS and SSO [20] cost allocation issues in RP80-61. Upon subsequent "approv[al] in its entirety by the Commission," the matter was finally disposed of and settled, with no reservation "specified" or "contained." The RP79-22 settlement agreement, on the other hand, demonstrated an appreciation of how to deal with an unresolved issue, for it had specifically "reserved for later settlement or decision" the GSS and SSO rate schedules of CGS. By way of emphasis, the RP79-22 settlement agreement continues, "Nothing in this Stipulation and Agreement will dispose of any of the issues in Docket No. 79-22 related to the GSS and SSO rates."

"PGA Clause Modification" was a topic afforded a separate article designation in both agreements. In

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[19] "HIOS" refers to the High Island Offshore System, a natural gas pipeline located in the Gulf of Mexico area.

[20] "GSS" and "SSO" refer to General Storage Service and Storage Service performed by CGS.

RP79-22, after a provision for separate treatment of demand and commodity costs of pipeline supplier gas purchases, there is an explicit reservation to the effect that the proper accounting for the cost of gas withdrawn from storage in determining unrecovered purchase gas costs should "be reserved for later determination." In RP80-61, on the other hand, the "unit of sales" approach is adopted for ascertaining the recovery of purchased gas costs. Nothing is reserved for subsequent determination.

By the same token, "Storage Accounting," a subject addressed in Article VIII of the RP80-61 settlement agreement, explicitly reserved certain cost issues for subsequent disposition by settlement or additional hearings in Docket RP80-61. Specifically, subsequent settlement or hearings would dictate the proper value of gas in storage inventory to be used in determining the working capital allowance underlying the costs of service.

An article entitled "Reservations," though differing in some apparently immaterial respects, was common both to the RP79-22 and the RP80-61 settlement agreements. Each emphasized that it confined itself to the specific issues in each case, and that the agreement did not, for any party, represent acceptance for other purposes (especially for other time periods) of any theory, principle or data underlying the settlement agreement. Both settlement agreements stated that "neither [CGS] nor [the FERC], its Staff, or any other party to these proceedings shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein."

Thus, having compared the two agreements, it is impossible to conclude that they mean the same thing and have the same effect insofar as a) allowing retroactive gas pricing at the NGPA level and b) permitting surcharges to effect collection. CGS clearly exhibited its awareness of how to put a matter finally to rest and,

equally, of how to reserve issues. It made explicit and effective reservations in the RP80-61 settlement agreement (*e.g.*, insofar as "Rate of Return" and "HIOS Separation Charges" are concerned). It did not, however, include any language in RP80-61 to reserve the issue of NGPA "all production" pricing, even though it had done so in the earlier settlement. While in the RP80-61 settlement agreement CGS made generalized reference to reservations "specified" or "contained" therein, one searches in vain for the reservation concerning NGPA pricing that CGS suggests is there "by implication." [21]

Indeed, the opposite conclusion must be drawn. As noted above, the agreement describes as its function the resolution of "*all* of the cost of service issues." (Emphasis supplied). In stark contrast, the RP79-22 settlement agreement first explicitly reserves the pricing issue, then makes clear that only "certain limited issues" are settled. As outlined above, a detailed comparison of the subsequent provisions of the two documents further bolsters the conclusion that NGPA pricing was not an issue reserved by the settlement in RP80-61. The generalized reservation to the specific issues in the case and the non-disposition for other purposes of any "theory, principle or data" simply do not stand up against the particularized statement that the parties contemplated resolution of "all of the cost of service issues." [22] NGPA pric-

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[21] There are other strained attempts to find support for the position of CGS that are so obscure (*e.g.*, the language of note 3 in Fifth Revised Sheet No. 68 attached as part of Appendix C, and issued on October 31, 1980, *i.e.*, over three months before the RP80-61 settlement agreement was filed by CGS) as not to require specific consideration and refutation.

[22] We pass without belaboring the question of why, if the generalized reservation had the excessively broad scope of meaning now asserted for it by CGS, it was necessary in the RP79-22 settlement agreement to insert so explicit a reservation of the NGPA pricing right.

ing versus the cost of service approach was an issue, and a hotly contested one.

Settlement of disputes involves mutual agreement, binding on both parties. CGS seeks to have things both ways, abiding by RP80-61 when the provisions are satisfactory to it, but seeking to shed a provision of importance to the FERC although the agreement contained no reservation. It is precisely a reservation that would be required if CGS were successfully to follow such a course.

Although the contrast between the RP79-22 and the RP80-61 settlement agreements makes our conclusion all the more inescapable, it is worth noting that the language of the RP80-61 agreement standing alone was probably enough to support that result. It is a reasonable interpretation device to conclude that what someone has not said, someone has not meant. In the succinct words of Judge John R. Brown in *Texas Eastern Transmission Corp. v. Federal Power Commission*, 306 F.2d 345, 348 (5th Cir. 1962), *cert. denied sub nom. Manufacturer's Light & Heat Co. v. Texas Eastern Transmission Corp.*, 375 U.S. 941 (1963), "[O]ne sure way to discourage voluntary settlements is . . . to read into contracts things which are simply not expressed or not there. . . . [The contract] should stand for what it says."

Moreover, and quite significantly, the FERC similarly interpreted the agreement, and interpretation by the federal agency concerned is entitled to deference.[23] We

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[23] *See Coca-Cola Co. v. Atchison, Topeka, and Santa Fe Ry. Co.*, 608 F.2d 213, 222 (5th Cir. 1979) ("even where the issue is one of . . . interpretation of contracts, tariffs, regulations and statutes, room still is present for deference to the views of administrative agencies, particularly where the understanding of the problem is enhanced by the agency's expert understanding of the industry"); and *Consolidated Gas Supply Corp. v. FERC*, 653 F.2d at 133:

> Our role in reviewing the Commission's decision is narrow. Section 19(b) of the Natural Gas Act provides that Commission

do not mean to infer that a court need accept an agency interpretation that black means white.[24] However, if the choice lies between dark grey and light grey, the conclusion of the agency, unmistakably possessed as it is of special expertise, in favor of one or the other will have great weight. Furthermore, independently of agency expertise in the present case, and purely as a matter of contract interpretation common to many areas of legal endeavor,[25] we reach the same conclusion as has the FERC as to the meaning of the RP80-61 agreement. Hence we have no occasion to retreat behind agency deference, though, were we to do so, it would only reinforce the result reached on a more direct and lawyerlike basis.

The FERC has read the RP79-22 settlement agreement as preserving to CGS the right to secure NGPA "all cost" pricing for the period December 1, 1978 through June 30, 1980. As to that decision CGS has no complaint. As for the RP80-61 settlement agreement, when it is placed side by side with the RP79-22 document, the reservation in one and the lack of reservation in the other spring forth and compel the conclusion that the hope of NGPA pricing for the July 1, 1980 through December 31, 1981 period had been discarded by CGS, presumably in return for another benefit or other benefits. CGS would hardly have entered the RP80-61 settlement

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findings "if supported by substantial evidence, shall be conclusive." 15 U.S.C. § 717r(b). In addition, we must defer to the Commission's regulatory expertise.

[24] For example, an attempted construction of the RP79-22 settlement agreement by the FERC as not reserving to CGS the right to pursue NGPA pricing for the December 1, 1978 through June 30, 1980 period could hardly prevail.

[25] *See Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 268-70 (1960) (Supreme Court reviews a decision of the Federal Power Commission based upon "canons of contract construction employed by the courts").

agreement unless it were perceived as benefitting CGS in one or more respects. Moreover, it hardly would have entered an agreement intending to reserve the NGPA pricing issue without saying so. Accordingly, having reviewed the FERC orders under attack, we are of the definite opinion that both should be

Affirmed.

22 F.E.R.C. (CCH) ¶ 61,120 (1983)

Consolidated Gas Supply Corporation, Docket Nos. TA 82-2-22-000 (PGA82-2, IRP82-2 and RD & D82-2) and RP82-64-000

Order Modifying Prior Commission Order, Summarily Disposing of Pipeline Production Issue in Part, Requiring Refunds and Consolidating Proceedings

(Issued February 4, 1983)

Before Commissioners: C. M. Butler III, Chairman;
J. David Hughes,
A. G. Sousa and
Oliver G. Richard III.

On July 30, 1982, Consolidated Gas Supply Corporation (Con Gas) filed a PGA seeking to obtain, *inter alia*, retroactive application of the maximum lawful prices established in the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. IV 1980) (NGPA) for company-owned "old production" valued on a cost-of-service basis. It asserted a right to obtain such treatment based on the court's holding in *Mid-Louisiana v. F.E.R.C.* (Mid-La);[1] and the resulting vacation of Order Nos. 58 and 98.[2] In

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[1] 664 F.2d 530 (Former 5th Cir. 1981), *mandate issued and rehearing denied*, March 2, 1982, *cert. granted*, 51 U.S.L.W. 3253, October 4, 1982 (Nos. 81-1889, 81-1958, 81-2042 and 81-19).

[2] Order No. 58, *Final Rule Governing the Maximum Lawful Price for Pipeline, Distributor or Affiliate Production*, Docket No. RM80-7, issued November 14, 1979, *FERC Statutes and Regulations, Regulation Preambles* 1977-1981 ¶ 30,101; Order No. 98, *Pricing of Pipeline Production on Under the Natural Gas Act*, Docket No. RM80-6, issued August 4, 1980, *FERC Statutes and Regulations, Regulations Preambles* 1977-1981, ¶ 30,177; rehearing of Order Nos. 58 and 98 denied, Order No. 102, *Natural Gas Pricing of Pipeline and*

its filing, Con Gas revalued its pipeline production in accordance with the Commission's order in Docket No. RP82-64.[3] It proposed a surcharge designed to recover retroactive adjustments of its company-owned production for the period December 1, 1978 through December 1, 1981.[4] Con Gas proposed to debit a special subaccount of Account No. 191 with the amount of the December 1978 through December 1981 undercollection, with interest through August of 1982. A semi-annual surcharge amount would be calculated to permit the recovery of one-sixth of the total subaccount balance in the instant PGA, one-fifth of the projected February 28, 1983 balance in its next projected February 28, 1983, balance in Con Gas' next PGA (March 1, 1983), one-fourth of the anticipated August 31, 1983, balance in its September 1983, PGA, and so on, to achieve total amortization over three years. Any residual balance remaining after the three-year period (six PGA filings) would be credited or debited to a regular Account No. 191 subaccount.

Affiliate Production Under the Natural Gas Act, Docket Nos. RM80-7 and RM80-6, issued October 3, 1980, *FERC Statutes and Regulations, Regulation Preambles* 1977-1981, ¶ 30,194.

[3] In Docket No. RP82-64-000, Con Gas sought to implement the effect of the *Mid-La* decision on its pipeline production on a *prospective* basis. It was allowed to do so, subject to refund, with the issue set for hearing; but the Commission ordered that further proceedings would not be established until the Commission had an opportunity to review the matter further and issue any further order that may be necessary. In that same docket, RP82-64-000, Con Gas stated that it reserved the right to collect NGPA rates retroactively to December 1, 1978, for all qualifying production at a time when it is able to assemble and verify all production, well category and other data required to implement NGPA pricing retroactively in accordance with the *Mid-La* decision.

[4] For the period after December 31, 1981, Con Gas has been allowed to implement *Mid-La* prospectively, subject to refund, by an order issued on April 30, 1982 in Docket No. RP82-64-000 [19 FERC ¶ 61,085].

On August 31, 1982 [20 FERC ¶ 61,243], the Commission issued an order in this docket which, among other things, accepted Con Gas' proposed tariff sheets for filing and suspended them to become effective September 1, 1982, subject to refund. The surcharge collection designed to recover retroactive adjustments for company-owned production to NGPA ceiling levels was made subject to the outcome of Docket No. RP82-64-000 in which the repricing issue has been set for hearing subject to further opportunity for the Commission to review the issues surrounding the *Mid-La* decision.

Since Docket Nos. RP82-64-000 and TA82-2-22 both deal with the issue of repricing of pipeline production, these dockets shall be consolidated.

The Commission is obligated to implement the mandate of the *Mid-La* court. Since a stay of the court's order was not granted, the court's mandate is currently effective.[5] The Supreme Court's grant of our petition for a writ of certiorari does not alter this fact. Nevertheless, we do have the duty to determine the extent to which we will implement *Mid-La* retroactively and the appropriate procedures for doing so. We must resolve in this docket the question of the extent to which Con Gas has the right to reprice its old production retroactively.

In order to evaluate Con Gas' proposal to reprice retroactively its company-owned production through a surcharge for the period of December 1, 1978 through December 31, 1981, we must consider two periods. First, we must consider the period covered by settlement agreements in Docket Nos. RP78-52 and RP79-22. That period included July 1, 1978 through January 31, 1980. Secondly, we must consider the period covered by a settle-

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[5] The Public Service Commission of the State of New York requested a stay of *Mid-La*, but the Former Fifth Circuit denied the request. The Commission did not file a request for stay.

ment agreement in Docket No. RP80-61 which covered the period February 1, 1980 through December 31, 1981.

As to the effect of settlement agreements on the repricing issue, in *El Paso Natural Gas Company* (El Paso),[6] the Comission discussed the effect of settlement agreements on a pipeline's right to reprice its own production, both retroactively and prospectively, to NGPA rates. The Commission noted that the courts often characterize settlement agreements as contracts which are binding on the parties and the Commission. The Commission also recognized that settlements serve important policy considerations and must be encouraged. If parties to a settlement could simply withdraw from an agreement whenever circumstances change and it suited their purposes to do so, the whole purpose of encouraging settlements would be frustrated. Thus, the Commission determined that in reviewing the effect to be given to settlement agreements for the *Mid-La* issue, the potential impact on the willingness of parties to enter into future settlements must be considered.

Our resolution of an issue in *El Paso* is instructive on the way in which we must resolve this issue here. In *El Paso*, a general Section 4 rate case had been settled in 1981 with the pipeline's old production (and some other production) included on a cost-of-service basis. The settlement agreement stated that this pipeline production was priced on a cost-of-service basis, but did not state whether this gas would be repriced, retroactively or prospectively, at a later date. The Commission found that the pipeline had agreed in the settlement of its jurisdictional pipeline rates to value this gas on a cost-of-service basis and had not preserved its right to reprice this gas under *Mid-La* to NGPA rates. Accordingly, the pipeline was denied the right to reprice its own production either

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[6] Docket No. TA82-2-33-001, 20 FERC ¶ 61,443 (September 30, 1982), *reh. denied*, 21 FERC ¶ 61,219.

retroactively or prospectively, until that settlement agreement expired on June 1, 1982.

The courts have characterized a settlement agreement variously as a "private contract," [7] as an "administrative contract," [8] or simply as a "contract." [9] In all cases, however, the rules of construction applicable to contracts have been held to apply to settlement agreements.[10] In addition, the courts have looked to the setting and the circumstances leading to settlement.[11] The circumstances considered in construing a settlement agreement include: (1) the fact that the company involved was litigating a Commission policy or order which could affect the case being settled; (2) other obligations outstanding at the time of the settlement; (3) and the statutory setting.[12] It is well established that what is not specifically stated in the settlement agreement cannot thereafter be read into it.[13]

If a pipeline (along with the Commission Staff and intervenors) has agreed to a general Section 4 rate settlement which is subsequently approved by the Commis-

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[7] *Texas Eastern Transmission Corp. v. F.P.C.*, 306 F.2d 345, 347 (5th Cir. 1962), *cert. denied, Manufacturer's Light & Heat Co. v. Texas Eastern Transmission Corp.*, 375 U.S. 941 (1963).

[8] *Texas Gas Transmission Corp. v. F.P.C.*, 441 F.2d 1392, 1395 (6th Cir. 1971).

[9] *Mobil Oil Corp. v. F.P.C.*, 570 F.2d 1021, 1025 (D.C. Cir. 1978).

[10] The Commission has also taken the view that the applicable principles are those of contract law. *See* "Order Remanding Proceeding," Independent Oil & Gas Association of West Virginia, Docket No. RI74-188-003, *et al.*, issued March 29, 1982, 18 FERC ¶ 61,289.

[11] *Texas Gas Transmission Corp. v. F.P.C., supra; Mobil Oil Corp. v. F.P.C., supra.*

[12] *Ibid.*

[13] *Texas Eastern Transmission Corp., supra* at 348. *See also* Corbin on Contracts § 564 (1960).

sion and there is no specific reservation of an issue (such as the pipeline production issue) in the terms of the settlement agreement, each party to the agreement (including the pipeline) "gave up" the right to its position on that issue (the right to charge a higher price for certain gas, for example) in order to reach an agreement. As the court stated in *Texas Eastern Transmission Corp.* (*supra* at 357):

> A settlement by its very nature is a compromise—a process by which positions, legal or factual, no matter how seriously maintained or legally supportable, are surrendered in whole or in part to achieve peace. If it is to be really a settlement, the parties will have weighed, consciously or unconsciously, the relative importance of subsidiary factors. Each party must give. How much to give is a matter for each party.

This is particularly true, as here, for those general Section 4 rate settlements executed after the enactment of the NGPA. The rules which were issued on December 1, 1978, governing all NGPA matters (including treatment of pipeline production) were interim in nature. A final Commission rule on rehearing on pipeline production was not issued until October 3, 1980. Throughout the Commission's consideration of the pipeline production issue in Docket No. RM80-6 (Order Nos. 98 and 102), pipelines argued that all pipeline production should be treated as a first sale under the NGPA and receive first sale rate treatment under the NGPA. Thus, for this group of settlements, it would be difficult for a pipeline to argue that it was not in any way foreseeable that first sale treatment for, all pipeline production was a possible, ultimate interpretation of the NGPA.

The binding nature of administrative settlement agreements has been discussed in a number of cases. In *Pennsylvania Gas & Water Co. v. F.P.C.*, 463 F.2d 1242 (D.C. Cir. 1972), the Court stated (at 1246):

> It is well to note at the outset that "settlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in court. As we shall see later, in agency proceedings settlements are frequently suggested by some, but not necessarily all, of the parties; if on examination they are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all the parties, even though not all are in accord as to the result. This is in effect a "summary judgment" granted on "motion" by the litigants where there is no issue of fact (footnote omitted).

In this Con Gas case, the settlement agreement in Docket No. RP73-107, *et al.*, that covers the first part of Con Gas' proposed retroactive repricing period [14] was certified to the Commission on August 16, 1979 and was approved by the Commission on November 16, 1979.[15] Article IV of the settlement agreement states, at page 10, "The treatment of pipeline production on Docket Nos. RP78-52 and RP79-22 shall be an issue reserved for hearing and Commission decision which decision shall be made on the basis of the hearing record or any subse-

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[14] As indicated at page 3 of the November 16, 1979 order approving the agreement in Docket No. RP73-107, the rates in Docket Nos. RP78-52 and RP79-22 became effective on July 1, 1978 and July 1, 1979, respectively. Article XIII of the agreement provides that the agreement shall terminate on the date that a Section 4 rate increase filing by Consolidated is made effective, an event which subsequently occurred on February 1, 1980. Thus, Con Gas is bound by the terms of the settlement agreements in Docket Nos. RP78-52 and RP79-22 for the period July 1, 1978 through January 31, 1980. That covers the first fourteen months of the December 1, 1978 through December 31, 1981 period for which Con Gas has requested a repricing surcharge to recover retroactive adjustments to obtain NGPA pricing for its pipeline production.

[15] *See Consolidaied Gas Supply Corporation*, Docket No. RP73-107, *et al.*, Order Approving Settlement Agreement Subject To Conditions, issued November 16, 1979, 9 FERC ¶ 61,185.

quent settlement agreement." It further states that "This agreement to reserve the pipeline production issue in Docket Nos. RP78-52 and RP79-22 shall not affect any party's right to seek rehearing, stay, and court review as to the applicability of the NGPA to such production and the validity of the Commission's rules, regulations, and orders thereunder." (Footnote omitted.)

While it is not clear that the settlement agreement specifically reserved the right of Con Gas to impose a surcharge for the purpose of retroactively collecting higher prices for its company-owned production for the December 1978 through January 1980 period, a review of the agreement indicates that Con Gas did preserve the right to make retroactive collection of *Mid-La* costs associated with Docket Nos. RP78-52 and RP79-22. Accordingly, it would not be reasonable to foreclose Con Gas' right to recover *Mid-La* costs for that portion of its retroactive repricing that is covered by Docket Nos. RP78-52 and RP79-22 which is December 1, 1978 through January 31, 1980.

On the other hand, we reach a different conclusion with respect to the twenty-three months, beginning February 1, 1980 and ending December 31, 1981, for which Con Gas seeks a repricing surcharge. That period of time is covered by the settlement agreement in Docket No. RP 80-61. The rates in Docket No. RP80-61 went into effect after a one-day suspension, subject to refund, on February 1, 1980 pursuant to an order issued on January 30, 1980.[16] In that docket, the Commission rejected the Con Gas tariff sheet that based pipeline production on NGPA rates. The Commission's January 30, 1980, suspension order stated:

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[16] *See Consolidated Gas Supply Corporation*, Docket No. RP80-61, Order Accepting For Filing And Suspending Certain Tariff Sheets, Rejecting One Tariff Sheet, Granting Intervention, And Deferring Action On Motion, issued January 30, 1980, 10 FERC ¶ 61,090.

> In accordance with the Commission's previous findings that the costs of old pipeline production should be based on cost of service and not pursuant to Section 104 of the NGPA, Seventeenth Revised Sheet No. 16 is hereby rejected and Alternate Seventeenth Revised Sheet No. 16 is hereby accepted, as hereinafter conditioned.

Con Gas did not appeal the Commission's rejection of NGPA pricing for its pipeline production in Docket No. RP80-61 and did not preserve the issue in a subsequent settlement agreement. The settlement agreement in Docket No. RP80-61 was certified to the Commission on March 5, 1981 and was approved by letter order dated April 3, 1981 [15 FERC ¶ 61006]. As discussed below, it covers the period beginning February 1, 1980 and ending when Con Gas' new Section 4 rates became effective on January 1, 1982. The body of the agreement does not address the pipeline production pricing issue. However, the fact that costs for that pipeline production were reflected in Consolidated's jurisdictional pipeline rates using a cost-of-service valuation methodology is apparent from the fact that pipeline production is listed as a cost-of-service item in Appendix A of the agreement. The agreement does not preserve any right to assert NGPA treatment for pipeline production. Article XIV of the settlement agreement does state, "In addition, neither Con Gas nor the Commission, its Staff, or any other party to these proceedings shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein." However, that standard language, common to many settlement agreements, does not preserve Con Gas' rights to NGPA pricing in this docket, since the settlement agreement did expressly provide for pricing of pipeline production on a cost-of-service basis. As we said in a recent order in *Mid-Louisiana Gas Company*,[17] when a pipeline

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[17] 19 FERC ¶ 61,016.

agrees to a Section 4 rate settlement subsequently approved by the Commission and there is no specific reservation of an issue, such as the pipeline production issue, in the terms of that settlement, the pipeline is considered as having given up its rights with respect to that issue.

On February 4, 1980, Con Gas filed a PGA, effective March 1, 1980. The transmittal letter did not include a reservation of any right to collect NGPA prices for pipeline production. In subsequent PGA filings on August 1, 1980, effective September 1, 1980 (TA80-1-22), and on January 30, 1981, effective March 1, 1981 (TA80-2-22 and TA81-1-22), Con Gas stated in its transmittal letters that it had included old pipeline production on a cost-of-service basis without prejudice to its position that such pipeline production is entitled to NGPA treatment and the outcome of court review of Commission orders rejecting its tariff sheets based on NGPA treatment. To the extent that Con Gas would argue that such "without prejudice" language is relevant, it should be clear that we find no basis for any argument that such a unilateral declaration could vary or alter terms of the settlement agreement in Docket No. RP80-61 which approves pipeline rates reflecting cost-of-service treatment for certain of Consolidated's pipeline production.

Article XIII of the settlement agreement in Docket No. RP80-61 states that its term shall end on the date that a general Section 4 rate filing by Con Gas is made effective or on the effective date of rates for Con Gas pursuant to a Section 5 proceeding. No rates have become subsequently effective pursuant to a Section 5 proceeding, and the succeeding Section 4 rate filing did not become effective until January 1, 1982 in Docket No. RP81-80-000.[18]

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[18] *See* Order Accepting For Filing And Suspending Tariff Sheets, Subject To Refund And Conditions, Granting Waivers, Initiating Hearing, Establishing Procedures And Denying Motion, *Consolidated Gas Supply Corporation*, Docket No. RP81-80-000, issued July 31, 1981, [16 FERC ¶ 61,105]. A proposed stipulation and agree-

Therefore, Con Gas has no right to reprice its production for the February 1, 1980 through December 31, 1981 period (covered by the agreement in Docket No. RP80-61-000) which ends the period for which Con Gas sought retroactive repricing in this docket.

In conclusion and for the reasons stated above, we summarily dispose of Con Gas' July 30, 1982 filing to the extent that it seeks to revise the company's tariff to reflect NGPA repricing of its pipeline's own production for the period February 1, 1980 through December 31, 1981. This is without prejudice to the rights of any party with respect to the prospective repricing question for the period raised by Con Gas in its July 30, 1982 filing for periods prior to and subsequent to the February 1, 1980 through December 31, 1981 time period, consistent with prior Commission orders.

Pursuant to the Commission's suspension order in this docket, on September 1, 1982, Con Gas began collecting, subject to refund, a surcharge designed to recover retroactive adjustments for company owned production. Consistent with our decision today, Con Gas shall revise its rates immediately to eliminate from the aforementioned surcharge adjustment amounts relating to the period February 1, 1980 through December 31, 1981 and shall refund to its customers with interest [19] the amounts Con Gas collected that are attributable to such portion of the surcharge.

The amounts in Docket Nos. RP82-64 and TA82-2-22 related to Consolidated's pipeline production which Consolidated is permitted to reprice to NGPA levels shall continue to be collected subject to refund and shall be

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ment in Docket No. RP81-80-000 was certified to the Commission on September 28, 1982. Article I of that agreement preserves the pipeline production issue for that docket and states that the issue is pending in Docket No. RP82-64.

[19] Interest is as prescribed in Section 154.67(d) of the Commission's Rules and Regulations.

further subject to Consolidated complying with all applicable NGPA regulations and subject to the decision of the U.S. Supreme Court on the appeal of the Fifth Circuit Court's *Mid-La* decision.

In light of the action taken above, the hearing ordered in Docket No. RP82-64 is vacated.

The Commission orders:

(A) Docket Nos. RP82-64-000 and TA82-2-22 are hereby consolidated.

(B) Ordering Paragraph (B) of the Commission's August 31, 1982 order in this docket is hereby modified to eliminate the repricing of company-owned production for the period February 1, 1980 through December 31, 1981 as an issue that is subject to the outcome of Docket No. RP82-64.

(C) Ordering Paragraph (C) of the Commission's August 31, 1982 order in this docket is hereby modified to eliminate the retroactive adjustment for company owned production for the period February 1, 1980 through December 31, 1981, without prejudice as discussed in the body of this order.

(D) As provided in the body of this order, Con Gas shall revise its rate refund to its customers with interest the amounts collected that are attributable to the surcharge it imposed for recovering retroactive adjustments for company owned production.

(E) The amounts in Docket Nos. RP82-64 and TA82-2-22 related to Consolidated's pipeline production which Consolidated is permitted to reprice to NGPA levels shall continue to be collected subject to refund and shall be further subject to Consolidated complying with all applicable NGPA regulations and subject to the decision of the U.S. Supreme Court on the appeal of the Fifth Circuit Court's *Mid-La* decision.

(F) The hearing ordered in Docket No. RP82-64-000 is vacated.

23 F.E.R.C. (CCH) ¶ 61,018 (1983)

Consolidated Gas Supply Corporation, Docket Nos. TA82-2-22-000 (PGA82-2, IPR82-2 and RD & D82-2) and RP82-64-000 *

Order on Rehearing Modifying Prior Order and Denying a Stay

(Issued April 6, 1983)

Before Commissioners: Georgiana Sheldon, Acting Chairman; J. David Hughes, A. G. Sousa and Oliver G. Richard III.

On July 30, 1982, Consolidated Gas Supply Corporation (Con Gas) filed a purchased gas adjustment (PGA) seeking to obtain, *inter alia*, retroactive application of the maximum lawful prices established in the Natural Gas Policy Act of 1978, 15 U.S.C. ¶ 3301-3432 (NGPA) for company-owned gas currently valued on a cost-of-service basis.[1] Con Gas asserted its right to obtain that price treatment based upon *Mid-Louisiana Gas Company v. F.E.R.C.* (Mid-La)[2] which vacated Commission Order Nos. 58 and 98.[3] Con Gas proposed a surcharge de-

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* Not consolidated.

[1] The production covered by this proposal includes Consolidated's wells drilled prior to January 1, 1973, on leases acquired prior to October 8, 1969.

[2] 664 F.2d 530 (Former 5th Cir. 1981), mandate issued and rehearing denied, March 2, 1982, *cert. granted*, 51 U.S.L.W. 32531, October 4, 1982 (Nos. 81-1958, 81-2042 and 81-191).

[3] Order No. 58, Final Rule Governing the Maximum Lawful Price for Pipeline, Distributor or Affiliate Production, Docket No. RM80-7, issued November 14, 1979, *FERC Statutes and Regulations* ¶ 30,101; Order No. 98, Pricing of Pipeline Production under the Natural Gas Act, Docket No. RM80-6 issued August 4, 1980, *FERC Statutes and Regulations* ¶ 30,177; rehearing of Order Nos. 58 and 98 de-

signed to recover retroactive adjustments of its company-owned production for the period December 1, 1978 through December 1, 1981.

On August 31, 1982 [20 FERC ¶ 61,243], the Commission issued an order in this docket which, among other things, accepted Con Gas' proposed tariff sheets for filing and suspended them to be effective September 1, 1982, subject to refund. The surcharge collection designed to recover retroactive adjustments for company owned production to NGPA ceiling levels was made subject to the outcome of Docket No. RP82-64-000 in which the issue was set for hearing subject to further opportunity for the Commission to review the issues surrounding the *Mid-La* decision.

On February 4, 1983, the Commission issued an order in this docket which partly disposed of the pipeline production issue.[4] In that regard, the Commission found that it was necessary to evaluate the Con Gas repricing proposal by reviewing the effect to be given to two settlement agreements covering the periods July 1, 1978 through January 31, 1980 and February 1, 1980 through December 31, 1981.

As to the first period, covered by the settlement agreement in Docket No. RP73-107, *et al.*, the Commission found that Con Gas preserved in that agreement the right to make retroactive collection of *Mid-La* costs associated with Docket Nos. RP78-52 and RP79-22. Accordingly, the Commission found that it would not be reason-

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nied, Order No. 102, Natural Gas Pricing of Pipeline and Affiliate Production under the Natural Gas Act, Docket Nos. RM80-7 and RM80-6, issued October 3, 1980, *FERC Statutes and Regulations* ¶ 30,194.

[4] *See Consolidated Gas Supply Corporation*, Docket No. TA82-2-22-000, *et al.*, Order Modifying Prior Commission Order, Summarily Disposing of Pipeline Production Issue In Part, Requiring Refunds and Consolidating Proceedings, issued February 4, 1983, 22 FERC ¶ 61,120.

able to foreclose Con Gas' right to recover *Mid-La* costs for that portion of its retroactive repricing proposal that is covered by those dockets, which is subject to the outcome of Docket No. RP82-64-000 in which the repricing issue has been set for hearing.

As to the period of February 1, 1980 through December 31, 1981, we found that the approved settlement agreement in Docket No. RP80-61 provided for a valuation of pipeline production on a cost-of-service basis and, unlike the agreement in Docket No. RP73-107, *et al.*, did not preserve any right of Con Gas or any other party to seek NGPA repricing. Accordingly, in our February 4, 1983, order we summariiy disposed of Con Gas' July 30, 1982 filing to the extent that it sought to revise Con Gas' tariff to reflect NGPA repricing of its pipeline production for the period February 1, 1980 through December 31, 1981.

On March 7, 1983 Con Gas filed an application for rehearing and a motion for a stay of the Commission's refund requirement. On that same date, an application for rehearing was filed by the Public Service Commission of West Virginia (PSCWV).

Con Gas' Application For Rehearing

In support of its application for rehearing, Con Gas states: (a) it has PGA authority to collect NGPA prices, (b) the settlement agreement in Docket No. RP80-61 reserves Con Gas' rights to NGPA prices; (c) other evidence corroborates Con Gas' interpretation of the settlement agreement in Docket No. RP80-61; (d) the Commission's order in *El Paso Natural Gas Company*,[5] does not support the Commission's decision in this case; (e) it was unlawful for the Commission to dispose summarily of Con Gas' claim that it is entitled to reprice its company-owned production for the period covered by the

[5] See note 6, *infra*.

settlement agreement in Docket No. RP80-61; and (f) the Commission erred in finding that the term of the settlement in Docket No. RP80-61 began on February 1, 1980.

Regarding the argument that it has PGA authority to collect NGPA prices, Con Gas could not have reserved any right to reprice its old production at NGPA rates by the mere inclusion of any such language in a transmittal letter attached to a PGA filing. It is clear from the Commission's regulations that the acceptance of a PGA for filing does not constitute approval of that filing by the Commission.[6]

With respect to arguments (b), (c) and (d) above, we find no basis for looking to "other evidence" as to Con Gas' intent in Docket No. RP80-61,[7] and we find no basis for reversing our conclusion that Article XIV of the settlement agreement in that docket does not preserve any right of Con Gas to NGPA pricing. The settlement agreement provides for pricing pipeline production on a cost-of-service basis and does not reserve any right of Con Gas to reprice that gas. As stated in our February 4, 1983 order in these dockets:

> [W]hen a pipeline agrees to a Section 4 rate settlement subsequently approved by the Commission and there is no specific reservation of an issue, such as the pipeline production issue, in the terms of that settlement, the pipeline is considered as having given up its rights with respect to that issue.

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[6] 18 C.F.R. § 154.23; *See Florida Gas Transmission Co.*, Order *Deciding Reserved Issue*, Docket Nos. RP79-64 and RP79-16, 19 FERC ¶ 61,293 (June 24, 1982) at p. 61,579.

[7] It has been held that what is not specifically stated in a settlement agreement cannot thereafter be read into it. *Mobil Oil Corp. v. F.P.C.*, 570 F. 2d 1021, 1025 (D.C. Cir. 1978).

The Commission's findings in *El Paso* [8] are indeed instructive on the way in which we must resolve the issue here for all the reasons stated at page 3 of that order. However, Consolidated argues that El Paso's situation is distinguishable because, Consolidated states, El Paso's settlement agreements specifically provided for cost-of-service valuation for certain of its production whereas Consolidated's settlement agreement did not.

We agree that Consolidated's settlement agreement does not specifically provide for cost-of-service treatment for its old pipeline production. But this does not alter our finding in this case that Consolidated did not preserve its right for the period covered by Docket No. RP80-61 to reprice its old pipeline production from a cost-of-service valuation methodology to an NGPA-based valuation methodology. The settlement agreement in Docket No. RP80-61 represents a settlement of Consolidated's Section 4 rate filing in that docket. The rates in the settlement agreement were supported by various costs, including costs associated with the valuation of Consolidated's old production on a cost-of-service basis. Since this point is conceded by Consolidated in its application (page 9), the fact that the settlement agreement does not specifically indicate this fact is not relevant to this inquiry.[9] Since the costs of old production were an issue in Consolidated's general Section 4 rate proceeding in Docket No. RP80-61,[10] and those costs were part of an overall general Sec-

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[8] *El Paso Natural Gas Company*, Docket No. TA82-2-33-001, *et al.*, Order Granting In Part and Denying In Part Rehearing Applications And Convening a Technical Conference On Certain Unresolved Issues, issued September 30, 1982. 20 FERC ¶ 61,443.

[9] Indeed, if Consolidated did not believe its old production were priced on a cost-of-service basis for the period covered by Docket No. RP80-61, it would not now be proposing a surcharge to recoup additional amounts related to its old production for this period.

[10] For example, the prudence of the costs incurred by Consolidated under the cost-of-service methodology for pipelines production was an issue in Docket No. RP80-61.

tion 4 rate settlement, the settlement agreement in Docket No. RP80-61 was the appropriate place for Consolidated to have preserved its right to a surcharge to recoup additional costs for its old production in the event the Commission's pipeline production rules were overturned on court review. The settlement is silent on the issue. As indicated in our earlier order, this silence supports our finding that Consolidated did not preserve its right to reprice its old production in Docket No. RP80-61.

With respect to its claim that the Commission acted unlawfully in disposing of Con Gas' alleged right to revise its tariff to reflect repricing of company-owned production, Con Gas argues that if the Commission's February 4, 1983 order is not reversed, it will be deprived of procedural due process and that it deserves on opportunity to prove the true intent of the settlement agreement in Docket No. RP80-61. That argument is unpersuasive. Con Gas' claim to repricing for the period covered by Docket No. RP80-61 was considered in our February 4, 1983 order and again in the instant order on rehearing. Con Gas provides no legal or factual basis for a claim that it is entitled to any additional opportunities to "prove" what the settlement agreement in Docket No. RP80-61 clearly provides. Where there is no ambiguity about the terms of an agreement, a hearing is not required to consider the construction of the terms. *See Citizens for Allegan County v. F.P.C.*, 414 F. 2d 1125 (D.C. Cir. 1969); *Michigan Wisconsin Pipe Line Company*, Docket No. RP80-3-000, Initial Decision issued August 21, 1980 (12 FERC ¶ 63,036); affirmed by Commission order issued March 18, 1981 (14 FERC ¶ 61,243).

As its final argument, we find that Con Gas has shown that the term of the settlement agreement in Docket No. RP80-61 began on July 1, 1980 and not on February 1, 1980 as stated in the Commission's order dated February 4, 1983. In reviewing Article VII of the Stipulation and Agreement in Docket No. RP73-107, *et al.*, and Ar-

ticle II of the Stipulation and Agreement in Docket No. RP80-61, as suggested by Con Gas, we find that the settlement agreement in Docket No. RP73-107, *et al.*, did not expire until June 30, 1980. Accordingly, we shall amend our February 4, 1983 order that summarily disposed of Con Gas' July 30, 1982 filing to the extent that it sought to reprice company-owned production for the period from February 1, 1980 through December 1, 1981 in order to make such summary disposition applicable to the period of July 1, 1980 through December 1, 1981. Thus, Con Gas will be permitted to reprice its pipeline production for the period from February 1, 1980 through June 30, 1980, subject to the conditions set forth in the February 4, 1983, order.

Con Gas' Motion for a Stay

Con Gas requests a stay of the Commission's February 4, 1983 order requiring rate reductions and refunds for the amount of its surcharge designed to recover retroactive adjustments for company owned production to the extent that such surcharge is attributable to the period covered by the settlement agreement in Docket No. RP80-61. Con Gas argues that it meets all the *Virginia Petroleum Jobbers* [11] test for a stay.

The standard of review for stays by an administrative agency is whether justice requires the grant of the stay under the Administrative Procedure Act (APA) 5 U.S.C. § 705. We recently applied that standard to deny a request for stay in *United Gas Pipe Line Company*, Docket No. TA82-2-11, issued August 25, 1982 (20 FERC ¶ 61,208). In applying the APA, we must balance the interests of Con Gas with those of its customers as well as the overall public interest. We must also determine whether the company will sustain any irreparable harm in the absence of a stay.

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[11] *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958).

For the reasons we stated in our February 4, 1983 order, we believe that the Commission will prevail on the merits. Regarding the allegation of irreparable harm, Con Gas has failed to state facts which could lead us to conclude that it is threatened with irreparable harm. The irreparable harm alleged by Con Gas is that it would be difficult to impose a surcharge prospectively to recover past undercollections, if it prevails on the NGPA repricing issue, because of current market conditions in the gas industry. Con Gas argues that return of amounts already collected from its customers could have the effect of making it "impossible" to recover NGPA rates retroactively. We note that if the court ultimately determines that Con Gas was entitled to collect additional revenues for a past period as a result of a court order requiring modifications of the Commission's order, the court or the Commission can permit Con Gas to impose a surcharge to recoup such amounts. That surcharge could include appropriate interest to make Con Gas whole for the time value of its money. Con Gas has presented no facts which persuade us that a surcharge would not be an effective means for preventing irreparable harm to Con Gas or that it might be impossible, as it alleges, to recover NGPA rates. Accordingly, we do not believe that the public interest requires that a stay be granted.

PSCWV's Petition for Rehearing

PSCWV asserts that the Commission's February 4, 1983 order is premature because the Supreme Court has granted *certiorari* in *Mid-La*, because PSCWV believes it is possible that *Mid-La* could be relitigated by different parties on different facts, because the Commission has not promulgated regulations to implement the *Mid-La* decision, and because PSCWV believes a Section 4 or 5 general rate case is the proper mechanism for implementing the *Mid-La* decision. We find those arguments unpersuasive. As we stated in our September 30, 1982 order on rehearing in *El Paso*, *supra*, the Commission is

obligated to abide by the outstanding mandate of the Former 5th Circuit, which is currently effective since a stay of the *Mid-La* decision was not granted; and the Commission has the discretion to determine the appropriate procedures for implementing *Mid-La* for past and future periods.

With respect to PSCWV's argument that implementing *Mid-La* retroactively constitutes retroactive ratemaking in violation of the filed rate doctrine, we find that the filed rate doctrine, which is part of the prohibition against retroactive ratemaking, is no bar to the Commission's authorizing surcharges to recoup NGPA prices for pipeline production for past periods. Pipeline companies may not recoup revenues foregone during a suspension period even if the higher rates that are suspended during an investigation are subsequently found to be just and reasonable. *F.P.C. v. Tennessee Gas Co.*, 371 U.S. 145 (1962). However, the Commission has the authority, after the suspension period, to order refunds of amounts collected subject to refund if it finds that the rates charged have been too high. In addition, the Commission has the authority to correct errors [12] to permit a party to collect revenues it would have collected but for an order found to be illegal upon further review by the Commission or by a reviewing court. Accordingly, for the reasons discussed above, we shall deny PSCWV's application for rehearing.

The Commission orders:

(A) The Commission denies the Con Gas and PSCWV petitions for rehearing except to the extent that Con Gas' petition is granted in Ordering Paragraph (B) below.

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[12] *See, e.g., American Trucking Association v. Frisco Transportation Co.*, 358 U.S. 133 (1958); *Willey v. U.S.*, 245 F. Supp. 669 (D.C. Ill. 1965); *Strickland Transportation Co. v. U.S.*, 274 F. Supp. 921 (D.C. Tex. 1967), *aff'd.* 389 U.S. 574 (1968).

(B) The Commission grants Con Gas' petition for rehearing in part, with respect to the time period for which the Commission's February 4, 1983 order summarily disposed of Con Gas' July 30, 1982 filing that sought NGPA repricing of its pipeline production, for reasons discussed in the body of this order. The February 4, 1983 order is modified consistent with this finding.

(C) Con Gas' motion for a stay is denied for reasons discussed in the body of this order.

15 U.S.C. § 3301(21) (1982)

(21) First sale

(A) General rule

The term "first sale" means any sale of any volume of natural gas—

(i) to any interstate pipeline or intrastate pipeline;

(ii) to any local distribution company;

(iii) to any person for use by such person;

(iv) which precedes any sale described in clauses (i), (ii), or (iii); and

(v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this chapter.

(B) Certain sales not included

Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.

18 C.F.R. § 154.38 (1984)

§ 154.38 Composition of rate schedule.

The sheets of a rate schedule shall contain a statement of a rate or charge and all terms and conditions governing its application, arranged as follows:

(a) *Title.* Each rate schedule shall have a title consisting of a designation (see § 154.34), and a statement of the type or classification of service to which it is applicable.

(b) *Availability.* This paragraph shall describe the conditions under which the rate is available, and, if necessary, the geographic zone in which available.

(c) *Applicability and character of service.* This paragraph shall fully describe the kind or classification of service to be rendered.

(d) *Statement of rate.* (1) Except as permitted in § 154.52, § 154.82 and Part 282, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

(2) A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

(3) No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: *Provided, however,* a natural-gas company may state in the service agreement or in rate schedules filed

pursuant to § 154.52 that it is or will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided further*, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part.

(4) A natural gas pipeline company may flow through changes in its cost of purchased gas [1] pursuant to a purchased gas adjustment clause (PGA clause). The proposed clause must be filed with the Commission and shall not be effective until approved by the Commission. No request for approval of a PGA clause will be considered unless the proposed clause meets the terms and conditions specified in paragraphs (d) (4) (i) through (viii) of this section. Any PGA clause approved by the Commission is subject to the conditions in paragraph (d) (4) (ix) of this section.

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[1] For the purpose of this paragraph, purchased gas costs represent the cost of well-head purchases, field line purchases, plant outlet purchases, transmission line purchases, and pipeline or affiliate production that qualifies for and is being afforded an area of nationwide rate under § 2.66 of this chapter, a maximum lawful price under § 270.203 of this chapter, or a rate specified under § 154.42(b) (1). Nonconcurrent exchange transactions may be reflected as a cost of purchased gas. If a company has underground storage, the cost of purchased gas included in Accounts 800, 801, 802, and 803, and where applicable, Account 806, shall be debited or credited to reflect the net injections or withdrawals from underground storage. This adjustment shall be prorated between pipeline and producer supply. New pipeline supplies (contractual daily delivery obligations) and liquified natural gas, synthetic natural gas, gas from coal gasification, and pipeline production when priced on a cost of service basis pursuant to Commission authorization shall not be reflected in a PGA clause without prior Commission approval.

FERC Order No. 16

F.E.R.C. STATUTES AND REGULATIONS (CCH) ¶ 30,023 (1978)

43 F. R. 56031 (November 30, 1978)

PART 154—RATE SCHEDULES AND TARIFFS

Final Regulation Requiring Jurisdictional Pipelines To Elect Either Adoption of PGA Clauses or General Section 4 Rate Filings To Recover Changes in the Cost of Purchased Gas

AGENCY: Federal Energy Regulatory Commission.

Federal Energy Regulatory Commission

ACTION: Final rule.

SUMMARY: This final rule requires natural gas pipeline companies to elect for three year periods whether to recover changes in purchased gas cost through a purchased gas adjustment provision (PGA Clause) or a general section 4 rate filing. The regulation is necessary in order to reduce the financial and administrative burden associated with the frequency of filings for changes in purchased gas cost. The effect of this regulation is to prevent companies which choose to include a PGA clause in their tariff from recovering changes in purchased gas cost in a section 4 filing. It also prohibits a company which chooses to recover changes in purchased gas costs in general section 4 rate filings from recovering changes in purchased gas cost through a PGA clause.

EFFECTIVE DATE: December 1, 1978.

FOR FURTHER INFORMATION CONTACT:

MaryJane Reynolds, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 (202) 275-4283.

Regulations of the Federal Energy Regulatory Commission (Commission) under the Natural Gas Act permit the inclusion of a purchased gas adjustment provision (PGA clause) in natural gas pipeline companies' tariffs under certain specified conditions. PGA clauses were originally permitted to avoid frequent consideration of rate increase filings caused by the constantly rising cost of purchased gas. (See Orders 452 & 452-A, 47 FPC 1049 (1972) and 47 FPC 1510 (1972) respectively.) However, the number and frequency of PGA filings reached such a magnitude that they imposed an undue financial and administrative burden upon the pipeline companies, their customers, the Commission staff, the state Commissioners and ultimate consumers. In Order No. 13, the Commission took action to reduce this burden by limiting the filing of future PGA rate changes to two per year and prescribing semi-annual filing dates for each pipeline company (43 FR 50167, October 27, 1978). The intended reduction in filings, however, would not be accomplished if pipeline companies responded to the order by including changes in purchased gas cost in general section 4 rate filings. The Commission therefore proposed a regulation in Docket No. RM79-1 to require jurisdictional pipeline companies to elect, for periods of three years whether to reflect changes in purchased gas cost in the PGA clause or in general section 4 rate filings under § 154.63 (43 FR 50191, October 27, 1978).

Interested parties were invited to submit comments on the proposed rule by November 20, 1978. Six timely comments were received from seven natural gas pipeline companies;[1] three late comments were also received. All parties supported the proposed rule, except the jointly filing pipelines. Specific points raised in the comments have been incorporated in the final regulation.

Other comments are discussed in the summary of the final regulation.

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[1] A joint filing was made by two pipelines.

SUMMARY OF THE FINAL REGULATION

The regulation adopted today amends 18 CFR 154.38 (d) (4) to require each interstate pipeline company to make an election whether to recoup all changes in purchased gas cost pursuant to its PGA clause or pursuant to a general section 4 rate filing. The election is binding for a three year period.

A company which selects the PGA option will not be permitted to include changes in purchased gas cost in general section 4 rate filings made during the period that the PGA option is in effect. However, a company which elects the PGA option, if confronted with severe financial consequences due to the election, may request a waiver from the Commission and file a general section 4 rate increase which includes changes in purchased gas cost.

Only one interested party challenges the Commission's authority to require an election of this type. It asserts that the Commission may not limit the rights of a natural gas pipeline company under the Natural Gas Act to file a general section 4 rate increase. Nothing in the election rule limits the right of any company to file a section 4 rate increase. The choice between section 4 and PGA treatment for purchased gas cost for each option period is exclusively at the discretion of the company. Furthermore, a company which chooses the PGA option may make section 4 filings to reflect changes in all costs other than purchased gas cost. Therefore in the Commission's view the election procedure in no way limits a company's section 4 rights.

The Natural Gas Act does not require that the Commission provide for PGA clauses and no pipeline has a statutory right to collect purchased gas cost through a PGA clause. However, the Commission believes that a company which chooses the PGA election is adequately protected even though it foregoes the right to file a sec-

tion 4 rate increase to reflect changes in purchased gas cost. Specifically, the PGA procedure allows the annualization of changes occurring during the 12 month historical test period including significant changes in purchase patterns. Moreover, amounts in the deferred account reflecting unrecovered purchased gas cost may now include carrying charges. Most importantly, if a company finds that the carrying charges are insufficient to protect its financial integrity, it may seek a waiver from the Commission which would allow it to include changes in purchased gas cost in a section 4 rate filing notwithstanding its currently effective PGA clause.

A. ELECTION PROCEDURE

Natural gas pipeline companies may elect once every three years which method will govern their method of recovery of changes in purchased gas costs for the three year period designated the "election period." Comments suggested that the election procedure should be detailed more fully in the regulations. The final rule has been modified accordingly.

Companies need not notify the Commission of their election. Any company with an effective PGA clause in its tariff on December 1, 1978, will be deemed to have chosen the PGA option. However, for this first election period a company with a PGA clause in effect on December 1, 1978, which chooses the non-PGA option must notify the Commission of its non-PGA option on or before December 1 but has until December 15 to file conforming tariff sheets with a proposed effective date of January 1, 1979. Thereafter if a different option is chosen for a subsequent election period, tariff sheets necessary to implement the option must be filed by December 1 preceding the election period beginning on January 1. Any company which does not file amended tariff sheets reflecting a changed option will be deemed to have chosen to continue the option of the previous election period.

B. EFFECT OF THE ELECTION

A company which has selected the PGA option shall file for changes in its purchased gas cost exclusively through its PGA clause for the entire election period. It may not file tariff sheets eliminating the effectiveness of its PGA clause during that period. Nor may it include changes in its purchased gas cost in any general section 4 filing during that election period unless it has received a waiver from the Commission.

The final rule has been clarified to assure that any company which chooses the PGA option for the first election period, beginning January 1, 1979, may not include changes in its purchased gas cost in any general section 4 filing during December 1978. The Commission has determined that this restriction is essential to the fundamental purpose of the rule. It will avoid numerous section 4 filings by companies electing the PGA option and will provide an orderly pass-through of the increases in purchased gas cost.

C. PURCHASED GAS COST COVERED BY THE ELECTION

The rule provides that any company which elects the PGA option may not include in a general section 4 rate filing any changes in purchased gas cost other than those which are included in rate adjustments filed pursuant to a PGA clause. The proposed rule failed to reflect the amendment to purchased gas cost adopted in Order 567, —— F.P.C. —— (1977). That order specified that with respect to pipeline production, only those purchased gas costs which qualify for and are being afforded area or nationwide rate treatment may be included in the PGA.

The final rule includes the change adopted in Order 567 and, in addition, allows for the inclusion of pipeline production which is not subject to an area or nationwide rate but is treated as though it were produced by an independent producer.

It was also suggested by one pipeline that the definition be amended to include new pipeline supplies (contractual daily delivery obligations) in the PGA without prior Commission approval. This proposition was previously addressed and rejected by the Commission in Order 452-A. No change in circumstances has been presented which would warrant a modification of the Commission policy expressed in Opinion 452-A. Accordingly, the definition is not being modified to include new pipeline supplies (contractual daily delivery obligations) prior to Commission approval.

D. WAIVERS

It is the intent of the Commission that companies electing the PGA option not file section 4 rate increases to reflect changes in purchased gas cost included in the PGA clause. However, the Commission recognizes that there may be a few isolated and unforeseeable instances where the pipeline (1) is unable to arrange for financing of the balances being carried in the deferred account (Account 191) or (2) is not able to earn its overall rate of return last allowed by the Commission because of the magnitude of the balances in the deferred account (Account 191) and a significant difference between the costs of financing the deferred amounts and the carrying charges allowed pursuant to § 154.38(d)(4)(iv)(c). In those cases, a waiver may be requested when the company files a section 4 rate case to include changes in purchased gas cost. If the waiver is granted, then changes in purchased gas cost would be included in the section 4 proceeding. If the waiver is denied, the tariff sheets filed with the section 4 proceeding will be rejected and new tariff sheets, excluding changes in purchased gas cost will have to be filed.

Several parties have commented that the grounds for waiver are too narrow. However it is the Commission's intention that those companies choosing the PGA option be prevented from including changes in purchased gas

cost in a general section 4 rate filing except under the most unusual circumstances.

Thus, the waiver standards are intended to provide relief only in very extraordinary cases. Moreover, the Commission believes that, in light of the flexibility allowed in PGA filings, including the newly promulgated provision allowing carrying charges, that the grounds for waiver, as promulgated, are appropriate.

One party commented that the standards for waiver were not sufficiently delineated in the proposed rule. The final rule sets forth the second test in more detail. The second test is two-fold. First the company must show that it is unable to earn its allowed rate of return. The allowed rate of return would include a rate established in a settled case which was submitted to and approved by the Commission as well as in a rate case in which the Commission had a fully litigated record upon which to base its final decision on the rate of return issue. Second, if a company is not meeting its allowed rate of return, it must then show that its not doing so is due to the magnitude of the balances in the deferred account (Account 191) and that finance charges substantially exceed carrying charges. This difference is a function of both interest rates and the volumes of gas covered by the PGA.

E. INTERACTION BETWEEN THE PGA CLAUSE AND SECTION 4 FILINGS

The rule specifically provides that changes in purchased gas cost covered by a PGA may not be included in a section 4 rate filing. Consequently the conforming amendments to § 154.63 have been adopted with the changes discussed herein. Pursuant to the final rule, § 154.63, a company which makes a section 4 rate filing shall reflect the "total system weighted average current unit cost of gas" as reflected in its currently effective PGA clause. This language merely clarifies that the "unit cost" used

in the proposed rule was intended to be a single unit cost reflecting all changes in purchased gas cost reflected in the PGA tariff rates.

The comments raised several points concerning section 4 rate filings by companies which select the PGA option which merit comment.

First, under the PGA option, companies are allowed both to annualize gas purchase cost and to reflect changes in supply patterns. Hence in making a section 4 filing a company which has selected the PGA option must calculate a single total system weighted average current unit cost of gas from data contained in its currently effective PGA clause. This unit figure excludes any surcharge collected under the PGA because the surcharge does not reflect current cost of purchased gas. In filing a section 4 rate increase the company may make adjustments in purchase and sales volumes but it may not adjust the total system weighted average current unit cost of gas reflected in the effective PGA to reflect estimated changes in purchase patterns. Consequently, the company in estimating the total adjusted costs must multiply the PGA unit cost by the projected purchased gas volumes.

Second, several companies suggested that for § 154.63 filings the PGA unit cost be the one effective at the time the section 4 filing is made, rather than the PGA rate last approved by the Commission as contemplated in the proposed rulemaking. The suggestion has been adopted in the final rule. This will allow use of the most current PGA rate and yet will not result in the overcharge of any customer because the PGA adjustment which has been set for hearing, but made effective, is subject to refund.

Third, one party is concerned that the Commission may no longer permit amendments to general section 4 rate case suspended rates to reflect PGA adjustments occurring during the suspension period. The concern is unfounded. The Commission does not intend to modify its

existing policy with respect to PGA adjustments occurring during the suspension period in a section 4 rate case.

Finally, one party has suggested that because of the exclusion of changes in purchased gas cost from a section 4 filing by a company which has chosen the PGA option, such a company will have no mechanism by which to establish a new base cost of purchased gas. Section 154.38(d)(4)(vi) has no provision for the establishment of a base cost of purchased gas, but it does require establishment of base tariff rates. The rule promulgated today provides that every company which elects the PGA option shall include in its restated base tariff rates filed either pursuant to § 154.38(d)(4)(vi) or § 154.63 its total system weighted average current unit cost of gas reflected in its currently effective PGA rate adjustment. The effective total system weighted average current unit cost of gas represents a company's base cost of purchased gas.

FINDINGS

(1) For the reasons set forth, the Commission finds that it is appropriate and in the public interest in administering the Natural Gas Act to adopt these amendments;

(2) For good cause as more fully described herein, the Commission finds that notice and comment on those provisions of the amendment adopted today which were not included in the proposed rule are impracticable and contrary to the public interest;

(3) In view of the purpose, intent and effect of the amendments, good cause exists for making them effective on December 1, 1978.

(Natural Gas Act (15 U.S.C. 717 *et seq.*) Administrative Procedure Act (5 U.S.C. 553), Department of Energy Reorganization Act (42 U.S.C. 7101, *et seq.*), and E.O. 12009, 42 FR 46267.)

CONCLUSION

In consideration of the foregoing, Part 154, Chapter I of Title 18, Code of Federal Regulations, is amended as set forth below, effective December 1, 1978.

By the Commission.

LOIS D. CASHELL,
Acting Secretary.

1. Section 154.38 is amended in subparagraph (4) of paragraph (d) by revising the introductory language and by adding a new subdivision (ix) to read as follows:

§ 154.38 Composition of rate schedule.

* * * *

(d) *Statement of rate.* * * *

(4) A natural gas pipeline company may flow through changes in its cost of purchased gas [1] pursuant to a purchased gas adjustment clause (PGA clause). The proposed clause must be filed with the Commission and shall not be effective until approved by the Commission. No request for approval of a PGA clause will be considered unless the proposed clause meets the terms and condi-

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[1] For the purposes of this paragraph, purchased gas cost represents the cost of well-head purchases, field line purchases, plant outlet purchases, transmission line purchases, and pipeline production that qualifies for and is being afforded area or nationwide rate treatment or is otherwise being afforded rate treatment as though the gas were being produced by an independent producer. Nonconcurrent exchange transactions may be reflected as a cost of purchased gas. If a company has underground storage, the cost of purchased gas included in Accounts 800, 801, 802, and 803, and where applicable, Account 806, shall be debited or credited to reflect the net injections or withdrawals from underground storage. This adjustment shall be prorated between pipeline and producer supply. New pipeline supplies (contractual daily delivery obligations) and liquified natural gas, synthetic natural gas, gas from coal gasification, and pipeline production when priced on a cost of service basis pursuant to Commission authorization shall not be reflected in a PGA clause without prior Commission approval.

tions specified in subdivisions (i) through (viii) of this subparagraph. Any PGA clause approved by the Commission is subject to the conditions in subdivision (ix) of this subparagraph.

* * * *

(ix) *Election of a PGA clause.* A natural gas pipeline company shall elect once every three years whether to recover all changes in purchased gas costs either through general rate filings made under § 154.63 or through filings made under a PGA clause prescribed in this paragraph.

(a) Procedure for election. For purposes of this paragraph, "election period" means a three year calendar period commencing on January 1, of every third year. The first election period commences on January 1, 1979. The election for an election period must be made on or before the first day of the December preceding the new election period and is binding for the entire election. Any company which has a PGA clause in its tariff on December 1, 1978, shall be considered to have elected to recover its changes in purchased gas cost exclusively through the PGA clause. However, such a company with a PGA clause in its tariff on December 1, 1978 which chooses not to use the PGA clause must notify the Commission by December 1, 1978 that it has elected not to recover any of its changes in purchased gas cost under a PGA clause. It shall file revised tariff sheets eliminating the PGA clause from its tariff, by December 15, 1978 to become effective January 1, 1979. Waiver of the notice requirements in § 154.22 is hereby granted to permit such conforming tariff sheets to become effective January 1, 1979. Any company which elects the PGA clause option pursuant to this paragraph may terminate its PGA clause effective as of the next election period by filing revised tariff sheets eliminating the PGA clause from its tariff. Such tariff sheets must be filed on or before December 1, preceding a new election period to

become effective on the first January 1 of the new election period. If a company does not make such a filing, it shall be considered to have elected to renew its PGA clause option for the new election period. A company which has chosen the non-PGA option for an election period may file revised tariff sheets implementing the PGA clause option for the next election period. Such tariff sheets must be filed on or before the December 1 preceding a new election period to make the PGA clause effective on the first January 1 of that election period.

(b) PGA clause option. Any company which has elected the PGA clause option for the first election period, beginning on January 1, 1979, may not include any changes in purchased gas cost in a general section 4 rate filing made under § 154.63 and which is filed in December 1978. Thereafter, during an election period for which a company has elected the PGA option, it shall file for changes in its purchased gas cost exclusively through its PGA clause. The company may not file tariff sheets eliminating its PGA clause from its effective tariff during the election period and may not include any changes in its purchased gas cost in a general section 4 rate filing made under § 154.63, during the election period for which the PGA clause is in effect: *Provided, however,* That a company may request the Commission for a waiver of the election and if granted may include changes in purchased gas cost in a general section 4 rate filing made under § 154.63.

To receive a waiver, the company must demonstrate that (*1*) it is unable to arrange for financing of the balances being carried in the deferred account (Account No. 191), or (*2*) is not able to earn its overall rate of return last allowed by the Commission because of the magnitude of the balances in the deferred account (Account No. 191) and a significant difference between the costs of financ-

ing the deferred amounts and the carrying charges allowed under paragraph (d)(4)(iv)(*c*) of this section.

(c) Non-PGA option. During an election period for which the company has elected the non-PGA option, a company shall file for changes in purchased gas cost exclusively in a general section 4 rate filing made under § 154.63. The company may not file tariff sheets to include a PGA clause in its effective tariff during that election period.

2. Section 154.63 is amended by revising subparagraphs (3) and (4) of paragraph (b) and by revising Schedule H(1)-3 of paragraph (f) to read as follows:

§ 154.63 Changes in a tariff, executed service agreement or part thereof

* * * *

(b) *Material to be submitted.* * * *

(3) *Major rate increase.* Class A companies (as defined in Subchapter F, Uniform System of Accounts for Natural Gas Companies, of this chapter) shall submit, in addition to the material required by subparagraph (1) of this paragraph, Statements A to M inclusive and O and P described in paragraph (f) of this section. Class B, C, and D companies, defined as above, shall file only Statements L, M, N, O, and P. Statement P, which is required to be submitted by all classes of companies, may be furnished not later than 15 days after the date of the filing. A natural gas company filing another major increase in rates or charges within a period of twelve months after the date of filing of Statements A through M and O and P or after the end of the test period used therein including the period of adjustments shown on Statements A through M may submit for such other increase Statements L, M, and N in lieu of Statements A through M if the proposed new rate increase is filed to compensate only for an increase in the cost of pur-

chased gas and there has been no material change in the company's facilities, sales volumes, and cost of service other than cost of purchased gas since such prior rate increase was filed. However, pipelines with Commission approved PGA clauses conforming to § 154.38(d)(4) shall not be permitted to include changes in purchased gas cost in filings made under this subparagraph unless they have received a waiver of their PGA election under § 154.38(d)(4). A pipeline with an effective Commission approved PGA clauses shall reflect in any filing made pursuant to this subparagraph the total system weighted average current unit cost of purchased gas reflected in the pipeline's latest effective PGA rate adjustment, unless the pipeline has received a waiver of its PGA election under § 154.38(d)(4).

(4) *Minor rate increase or rate decrease.* Only Statement L through N need be filed in addition to the material required by subparagraph (1) of this paragraph. (Statements L through N are not required to make effective rate changes or tariff provisions ordered by the Commission). A pipeline with an effective Commission approved PGA clause conforming to § 154.38(d)(4) shall not be permitted to include changes in purchased gas costs in rate filings made pursuant to this subparagraph unless the pipeline has received a waiver of its PGA election under § 154.38(d)(4). A pipeline with an effective Commission approved PGA clause shall reflect in any filing made under this subparagraph the total system weighted average current unit cost of purchased gas reflected in the pipeline's latest effective PGA rate adjustment, unless the pipeline has received a waiver of its PGA election under § 154.38(d)(4). However, the pipeline may adjust the purchased gas volumes.

* * * *

(f) *Description of statements.* * * *

Schedule H(1)-3, a schedule showing either: (a) In the case of a pipeline which has a Commission approved

PGA clause in its tariff, its total system weighted average current unit cost of purchased gas reflected in the pipeline's latest effective PGA rate adjustment. However, the pipeline may adjust its purchased gas volumes as provided in (b) hereof; or (b) in the case of a pipeline which does not have a Commission approved PGA clause in its tariff or in the case of a pipeline which has a Commission approved PGA clause but obtains a waiver of its PGA clause election under § 154.38(d)(4), the total annual cost of gas purchased for the 12 months of actual experience, the adjustments thereto, and the total adjusted cost for test period, with the data grouped by States and producing areas and detailed by contract or rate schedule designation, field, volumes in Mcf at a common pressure base and price in total for the contracts or rate schedules under which actual or adjusted volumes exceed 1,000,000 Mcf annually. Field purchases under rate schedules where the actual or adjusted volumes are less than 1,000,000 Mcf annually may be grouped by field or producing area. Purchases from pipelines in any volume shall be shown in full detail by rate schedule including splits between demand and commodity charges.

In the event adjustments are made to the volumes of gas taken from any source during the 12 months of actual experience, a detailed explanation and data in support of the adjusted volumes shall be furnished. No adjustments are to be made to reflect the attachment of new gas supplies unless both the filing company and the supplier have each obtained the required permanent or temporary certificates of public convenience and necessity and the necessary facilities by both are or will have been in operation during the test period.

In the event the adjustments to volume aggregate more than 10 percent of the total volume of gas purchased during the 12 months of actual experience, and are due to change in gas purchase pattern or additional gas

supply, the minimum take-or-pay-for quantities for each source of supply, applicable at the end of the test year period, and the reasons for making such adjustments shall be submitted.

If the company purchases and sells gas under exchange agreements, the method of recording on books, total gross volumes exchanged, net dollar amounts involved and details of each major exchange shall be submitted.

Attachment 1

FEDERAL ENERGY REGULATORY COMMISSION

Washington, D.C. 20426

In reply refer to:

OPPR—Tariff Branch
Consolidated Gas Supply Corporation
Docket Nos. RP78-76 and R-406

Dec. 26, 1978

Consolidated Gas Supply Corporation
445 West Main Street
Clarksburg, West Virginia 26301

Attention: H. B. Griffith, Jr., Vice President

Reference: (1) First Revised Sheet Nos. 69, 70 and 71; and Original Sheet No. 71-A filed November 27, 1978.

(2) Ninth Revised Sheet No. 16; Second Revised Sheet Nos. 69, 70 and 71; First Revised Sheet Nos. 66, 67, 68, 71-A, 72 and 73.
All to FPC Gas Tariff, Third Revised Volume No. 1.

Gentlemen:

The Commission has granted waiver of notice requirements and accepted the above tariff sheets comprising a GRI rate adjustment and modifications to your PGAC.

The effective date for sheets in Item (1) is December 1, 1978. The effective date for the sheets in Item (2) is January 1, 1979.

The PGAC modifications relating to pipeline production are accepted for filing, suspended and made effective subject to refund as of December 1, 1978, and subject to

the outcome of the proceedings at Docket Nos. RP73-107, RP74-90, and RP75-91.

Your request for Account 191 treatment of unrecovered AGA payments has been denied but you are permitted to refile to recover such amounts through your base rates.

This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of the referenced filing or of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in your tariff; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

By direction of the Commission.

/s/ Kenneth F. Plumb
Secretary

cc: All Parties

Morgan, Lewis and Bockius
Counselors At Law
1800 M Street, N.W.
Washington, D.C. 20036

[¶ 61,077]

Regulations Implementing the Natural Gas Policy Act of 1978, Docket No. RM79-3

Order Granting Rehearing for Purposes of Further Consideration and Denying Stay

(Issued January 29, 1979)

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

On December 29, 1978, Consolidated Gas Supply Corporation (Consolidated) filed an application for reconsideration and stay of Section 270.203 of the Commission's Interim Regulations implementing the Natural Gas Policy Act of 1978 (NGPA). On January 3, 1979, the Commission issued Order No. 21,[1] which prescribed a Final Regulation providing for a rehearing procedure for rules or orders issued under the NGPA. Inasmuch as there was no specific provision for filing petitions for rehearing of the NGPA Rules at the time this application was filed, we will treat Consolidated's application for reconsideration as an application for rehearing under Section 286.102 of our Regulations under the NGPA.

Since the Regulation in question is an Interim Regulation and since the Commission wishes to consider public comments on the validity of all its Interim Regulations, we will grant Consolidated's application for rehearing solely for purposes of further consideration. This action does not constitute a grant or denial of the application on its merits in whole or in part. As provided in Section 1.34(d) of the Commission's Rules of Practice and Procedure, no answers to the applications for rehearing will be entertained by the Commission, since this order does not grant rehearing on any substantive issues.

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[1] Docket No. RM79-12, *FERC Statutes and Regulations* ¶ 30,032.

In support of its motion for stay [2] appellant states that the Regulation in question "has the impermissible effect of setting a lower ceiling price than that permitted by the NGPA," and that it would suffer irreparable injury in that it would be permanently deprived of revenues to which it is entitled under the NGPA.

We are unconvinced by Consolidated's allegations of irreparable harm. In the event a court determines that this Regulation is unlawful, this Commission could authorize the collection of revenues denied by this provision through surcharges.[3] Accordingly, Consolidated has not shown good cause for a stay of § 270.203 of the Interim Regulations and we shall deny Consolidated's application for stay.

The Commission orders:

(A) Rehearing is granted solely for purposes of further consideration.

(B) Consolidated's application for stay is denied.

Commissioner Holden voted present.

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[2] Order No. 20, issued in Docket No. RM79-9, *FERC Statutes and Regulations* ¶ 30,029, prescribes a procedure for applying for stay of Interim Regulations under the NGPA.

[3] See orders issued June 27, 1978, 3 FERC ¶ 61,269, in Docket No. AR61-2 *et al.*, and July 31, 1978, 4 FERC ¶ 61,095, in Docket No. AR69-1.

PRIVILEGED

SUBMITTED PURSUANT TO SECTION 1.18(e)(3) OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, 18 C.F.R. Sec. 1.18(e)(3)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP80-61

CONSOLIDATED GAS SUPPLY CORPORATION

STIPULATION AND AGREEMENT RESOLVING COST OF SERVICE AND PGA ISSUES

This unanimous Stipulation and Agreement is intended to provide for the resolution of all of the cost of service issues and the PGA issues described in Article VII now pending before the Commission in the rate proceeding of Consolidated Gas Supply Corporation (Consolidated) in Docket No. RP80-61 and is submitted as an uncontested settlement pursuant to Section 1.18(e)(3) of the Commission's Rules of Practice and Procedure.

Procedural Background

On December 28, 1979, as revised February 19, 1980, Consolidated filed a general rate decrease application and implementing tariff sheets in Docket No. RP80-61 which were accepted for filing and suspended for one day by Commission orders dated January 30 and March 19, 1980. On June 30, 1980, Consolidated filed to revise its rates to comply with the Commission's order of January 30, 1980. On September 3, 1980, Consolidated filed supplemental testimony and exhibits related to rate of return, pipeline production, and to show the impact of declining sales quantities.

On May 28, 1980, the Staff of the Commission filed its top sheets. Since that time, there have been several in-

formal conferences concerning the various issues involved in Docket No. RP80-61. As a result of such conferences, the participants have reached this unanimous Stipulation and Agreement which resolves cost of service and purchased gas adjustment clause issues, except for certain reserved issues as specified in this agreement.

Additionally, during the course of settlement negotiations in Docket No. RP80-61, the Commission issued Opinion No. 100 in Docket No. RP79-22 (Storage). Opinion No. 100 relates to certain allocation issues reserved for hearing by Article VI of the Stipulation and Agreement approved by the Commission on November 16, 1979, in Docket Nos. RP73-107, *et al.* On December 18, 1980, the Commission issued an Order Granting Rehearing For Purposes Of Further Consideration And Granting Temporary Stay stating:

> The Commission finds that good cause has been shown to grant a temporary stay of the effectiveness of Opinion No. 100, not to exceed 90 days, pending final Commission action on the application for rehearing. By setting this 90-day time limit, the Commission hopes to encourage and expedite the settlement negotiations in this proceeding.

Following the issuance of the rehearing order, the parties have negotiated a unanimous settlement agreement (hereinafter referred to as the Cost Allocation Agreement) which is filed simultaneously with this agreement and which, if approved, would resolve the GSS and SSO cost allocation issues as they arise in both Docket Nos. RP79-22 and RP80-61.

The Commission Staff has indicated that it will file comments or objections to the Cost Allocation Agreement. In that event, the participants request that the uncontested settlement agreement on cost of service and PGA issues be processed separately.

Article I

Interim Refunds and Rate Reductions

Within thirty (30) days of the date upon which this Stipulation and Agreement is approved by the Commission by a final and nonappealable order, and the Commission has acted by final order upon the Cost Allocation Agreement, Consolidated will file revised tariff sheets to reflect the base tariff rates set forth in either Appendices A, B, or C of the Cost Allocation Agreement, as appropriate. The base tariff rates shown in the listed Appendices, including the fixed cost component of the sales rates set forth therein, shall be adjusted to reflect any rate changes made by Consolidated subsequent to July 1, 1980, effective as of the effective rate or dates of such rate changes. Consolidated's PGA filings shall be modified as necessary to reflect the appropriate cost of gas contained in the settlement rates.

Consolidated will refund to its jurisdictional customers the difference between the revenues at the base tariff rates under the rate schedules set forth in the Appendices that become effective under the Cost Allocation Agreement and the revenues at the base tariff rates that were actually charged for volumes sold or transported by Consolidated. Refunds shall be calculated for the period beginning July 1, 1980, to the date upon which Consolidated first begins to charge the base tariff rates provided for in the Appendices.

Interest will be computed at the appropriate rate, as prescribed in Section 154.67 of the Commission's Regulations, on all refunds made under this Article.

In the event Consolidated is required to make interim refunds prior to the entry of a final and nonappealable order in this proceeding resolving the GSS and SSO cost allocation issues, Consolidated shall be entitled (1) to credit any excess interim refunds made to any customer

against subsequent refunds, and (2) to collect a rate surcharge to recoup any excess refunds not recovered in (1) above, applied in a manner to permit Consolidated to recover any undercollections that may result from the final resolution of the cost allocation and rate design issues related to GSS and SSO, provided however that the rate surcharges may not result in a total rate in excess of the rates originally filed.

Article II

Cost of Service

Set forth on page 1 of Appendix A, attached hereto, is the settlement cost of service summary underlying the rates to be effective for the period July 1, 1980, through March 31, 1981, which, subject to the reservations contained herein, has been agreed to for purposes of settlement.

Article III

Rate of Return

It is stipulated and agreed that the rate of return on common equity and the treatment of gain on reacquired debt to be applied in determining rates and refunds in Docket No. RP80-61 shall be the same as the rate of return on common equity and the treatment of gain on reacquired debt as decided by the Commission in a final and nonappealable order issued in Consolidated's prior rate case proceeding in Docket No. RP79-22. Orders of the Commission on these two issues are now pending review in *Consolidated Gas Supply Corp.* v. *FERC*, Fourth Circuit No. 80-1219. When an order of the Commission in Docket No. RP79-22 becomes final and no longer subject to judicial review, the rate of return on equity and the debt cost associated with the treatment of the gain on reacquired debt decided therein shall be applied to the capitalization shown in Appendix B. The allowances for return and income taxes included in the

costs of service in Appendix A shall then be revised consistent therewith. The rates shown on Appendices A, B, or C to the Cost Allocation Agreement shall be revised accordingly, and additional refunds with interest as described in Section 154.67 of the Commission's Regulations shall be paid.

Article IV

HIOS Separation Charges

Included in the settlement costs of service attached as Appendix A are components of the HIOS transportation rates of $.43 per Mcf of billing demand and 1.41¢ per Mcf overrun representing the charges for separation facilities. It is stipulated and agreed that this issue be reserved and tied to the outcome of a similar issue in Texas Gas Transmission Corporation (Texas Gas), Docket No. RP78-94. A Commission resolution of the merits of that issue in the Texas Gas proceeding shall be applied to this reserved issue.

If, as a result of a final Commission decision and order in the Texas Gas proceeding, Consolidated is not permitted to include in its rates the HIOS transportation charges for the separation facilities, then Consolidated shall decrease its jurisdictional rates as follows: (1) The demand portion of Consolidated's jurisdictional rates shall be reduced by an amount determined by multiplying the HIOS demand rate for separation facilities times Consolidated's transportation contract demand with HIOS, which are reflected in Consolidated's then effective rates, further multiplied by twelve, further multiplied by 92.570847%. The amount so determined shall then be divided by 40,959,345 Dt of billing demand to determine the reduction to the demand portion of Consolidated's jurisdictional rates; (2) The commodity portion of Consolidated's jurisdictional rates shall be reduced by an amount determined by multiplying the HIOS overrun rate for separation facilities times the overrun volumes

which are reflected in Consolidated's then effective rates. The amount so determined shall be divided by 571,109,000 Dt to determine the commodity rate reduction. In the event the demand rate reduction is less than one cent per Dt, then the entire rate reduction determined in (1) and (2) shall be made through the commodity component. Consolidated shall file revised tariff sheets to its FERC Gas Tariff to reduce its then-effective rates, by the amount as determined herein, such tariff sheets to be effective on the first day of the month after the date upon which the Commission's order becomes final. In addition, Consolidated will refund to its jurisdictional customers the jurisdictional portion of the amount paid to HIOS for separation charges from and after July 1, 1980, to the effective date of the above-determined rate reduction. Such refunds shall be made on an as-billed basis, unless such refund results in a unit change of less than one cent per Dt of billing demand in which case such refund shall be made through the commodity component. Interest will be computed at the appropriate rate, as prescribed in Section 154.67 of the Commission's Regulations.

Article V

Full Tax Normalization

In Article XI of the Stipulation and Agreement in Consolidated Gas Supply Corporation, Docket Nos. RP73-107, *et al.*, approved by Commission order dated November 16, 1979, it was agreed that beginning January 1, 1979, Consolidated adopt full normalization subject to Consolidated receiving a satisfactory ruling from the Internal Revenue Service that adoption of full normalization will not prejudice Consolidated's ability to claim liberalized depreciation for income tax purposes and subject further to Consolidated receiving an opinion from the Office of Chief Accountant affirming that maintenance of deferred tax accounts by vintage years is not required where full normalization and comprehensive interperiod

tax allocation methodology is being employed for rate purposes.

It is stipulated and agreed that Consolidated continue to reflect full normalization in the instant proceeding subject to the same conditions as stated in Article XI of the aforementioned Stipulation and Agreement. Accordingly, it is agreed to include in the calculation of income taxes for the costs of service in Appendix A $2,384,546 as an addition in the amount subject to federal and state income taxes.

Article VI

GSS and SSO Rates

The parties have unanimously settled the GSS and SSO cost allocation issues in this proceeding as provided for in the separate Cost Allocation Agreement. In the event such agreement is not approved in its entirety by the Commission, it is agreed that with respect to the remaining issues:

1. The Commission's final decision in Docket No. RP79-22 (Storage), that is no longer subject to judicial review, will be binding in Docket No. RP80-61 to the extent that changed circumstances have no material bearing on the allocation method adopted in such decision, *provided* however that parties will be allowed to present evidence of changed circumstances in this docket, and *further provided that*, the instant stipulation is not to be construed as a bar to any party seeking rehearing, judicial review, or stay of the Commission's decision in Docket No. RP79-22 (Storage).

2. Within thirty (30) days following the date of issuance of the Commission's final order in Docket No. RP79-22 (Storage) that is no longer subject to judicial review, any party to Docket No. RP80-61 claiming changed circumstances relating to those issues decided in Docket No. RP79-22 (Storage) shall

file a motion with the Presiding Administrative Law Judge in Docket No. RP80-61 to establish hearing procedures, and to suggest procedural dates.

Article-VII

PGA Clause Modifications

It is stipulated and agreed that Consolidated is authorized to revise the PGA provisions of its tariff, effective December 1, 1980, to reflect the recovery of purchased gas costs under a "unit of sales" methodology. The proposed PGA provision is contained in Appendix C to this Stipulation and Agreement.

Upon issuance of a Commission order approving this settlement, Consolidated shall file the tariff sheets attached as Appendix D relating to flow-through of supplier refunds.

Article VIII

Storage Accounting

The proper value of gas in storage inventory to be used in determining the working capital allowance underlying the costs of service shown in Appendix A attached hereto shall be reserved for disposition by settlement or hearing in this Docket. If settlement is not reached within thirty (30) days of filing this Stipulation and Agreement, the parties agree to expedite any additional hearings that may be necessary.

Article IX

Sales Refund Obligation

For the twelve months ending June 30, 1981, and for any subsequent twelve-month period ending June 30 during the term of this Agreement, if total actual sales quantities exceed 575,351,000 Dt, excluding presently certificated off-system sales to Consolidated Edison Company of New York, Inc. (Con Ed) and Texas Gas Transmis-

sion Corporation (Texas Gas) and sales made pursuant to the Commission's emergency sale regulations, but including the sales to Texas Eastern Transmission Corportation (Texas Eastern), which were commenced under the emergency regulations but are now the subject of a certificate application in Docket No. CP81-69-000 and any future certificated sales at the E rate, Consolidated agrees to refund to its jurisdictional customers the jurisdictional portion of the amount determined as follows:

(a) For the twelve months ending June 30, 1981, such excess sales quantities shall first be allocated between the period prior to April 1, 1981, and the period beginning April 1, 1981, on the basis of the ratios of the sales during each period to the total. The excess quantities allocated to the period prior to April 1, 1981, shall be multiplied by the fixed cost component set forth in Appendix A or C attached to the separate Cost Allocation Agreement (adjusted as a result of this agreement and/or a Commission decision on the reserved issues herein). To this amount shall be added the amount determined by multiplying the excess quantities allocated to the period beginning April 1, 1981, by the fixed cost component set forth in Appendix B or D attached to the Separate Cost Allocation Agreement (adjusted as a result of this agreement and/or a Commission decision on the reserved issues herein).

(b) For any subsequent twelve-month period ending June 30 such excess sales quantities shall be multiplied by the fixed cost component set forth in Appendix B or D, attached to the separate Cost Allocation Agreement (adjusted as a result of this agreement and/or a Commission decision on the reserved issues herein).

The jurisdictional portion of such amount shall be determined by multiplying such amount by the ratio of

jurisdictional sales to total sales for the applicable twelve-month period.

The Texas Eastern sales quantities and any future sales quantities at the E rate that are subsequently certificated shall be adjusted upward, for purposes of this article, by a factor equal to (i) the sum of the fixed cost component * and the difference between the Rate Schedule RQ commodity rate and the Rate Schedule E rate divided by (ii) the fixed cost component.* In approving this Stipulation and Agreement, the Commission shall waive its emergency sale regulations insofar as they would require the crediting to Account 191 of revenues from the Texas Eastern sale included in total actual sales quantities as defined in this Article.

In the event that the total actual sales quantity for the twelve-month period ending June 30, 1981, or for any subsequent twelve-month period, exceeds 575,351,000 Dt, Consolidated shall have the right to offset increases in Consolidated's actual cost of service against the total amount of refunds computed pursuant to the above paragraphs of this Article IX. The amount by which the actual cost of service exceeds the settlement cost of service shall constitute the total amount of any such offset. The actual cost of service to be determined for purposes of the offset shall be developed in accordance with the same principles and procedures used to develop the settlement costs of service set forth in Appendix A, shall reflect the actual costs for the respective period per books excluding major out of period items and shall include an allowance for overall rate of return at the filed percentage, or such other rate as may become effective under Article III, applied to actual average rate base for the respective period but shall exclude purchased gas,

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* The appropriate fixed cost components are set forth in Appendices A, B, or C to the Stipulation and Agreement Resolving Cost Allocation Issues.

transportation and other costs which are trackable under Consolidated's tariff or this Stipulation and Agreement.

If, as a result of the termination of this Stipulation in accordance with the provisions of Article XIII, the final refund period is less than twelve (12) months, the potential refunds, if any, for such partial refund period shall be determined by multiplying (1) the refunds which would have been determined for the full twelve-month period beginning with the preceding July 1 by (2) the ratio of the total actual jurisdictional sales quantities for the partial period to the total actual jurisdictional sales quantities for the full twelve-month period.

Refunds required under this Article shall be made within ninety (90) days after the end of each full twelve-month period, and shall include interest at the appropriate rate as prescribed in Section 154.67 of the Commission's Regulations, commencing with the end of such twelve-month period.

If Consolidated is required to make refunds under the above provisions of this Article IX, then Consolidated agrees to make additional refunds to its jurisdictional sales customers equal to the amount collected, if any, under the Winter Requirement Quantity Adjustment provision of its tariff. Refunds will be allocated among sales customers in proportion to their jurisdictional purchases for the most recent November 1st through March 31st period.

Article X

Transportation Rate Adjustments

Consolidated shall decrease and may increase its rates to reflect changes in the annual cost of transportation of gas by others from the $26,886,754 contained in the settlement costs of service in Appendix A. Such changes shall be coincident with Consolidated's semi-annual Purchased Gas Adjustment filings. The transportation rates

and quantities to be used in computing the annual cost of transportation of gas by others shall be annualized to reflect the rates and quantities which will be in effect as of the proposed effective PGA date. All changes in rates under this Article shall be calculated on a unit basis. The Unrecovered Purchased Gas Cost Account as established in Section 12.3 of the General Terms and Conditions of Consolidated's FERC Gas Tariff shall be credited with the jurisdictional portion of any refunds received, including interest. In addition, a non-interest bearing sub-account to the Unrecovered Purchased Gas Cost account shall be debited or credited monthly effective July 1, 1980, to reflect undercollections or overcollections resulting from the application of this paragraph of this Article.

Consolidated agrees that the jurisdictional portion of any revenues received in excess of the amount reflected in the settlement cost of service which are attributable to gas transported for others shall be flowed through to its customers using the method for allocating transmission commodity costs implemented by Consolidated as the result of final Commission action on the Cost Allocation Agreement. The revenues applicable to GSS shall be reflected as a credit to the GSS customers' bills. The remaining revenues, applicable to sales, shall be credited to Account 191, Unrecovered Purchased Gas Costs, effective July 1, 1980. Nothing in this Article shall preclude Consolidated from retaining one cent per Mcf transported, or such other amount, to the extent permitted by the Natural Gas Act, the Natural Gas Policy Act of 1978, or the Commission's Regulations thereunder.

To the extent that revenues received are not credited to Account 191, interest shall be paid thereon in accordance with Section 154.67 of the Commission's Regulations from the date revenues were received to the date of crediting to Account 191.

Article XI

Tracking for Advance Payments

During the term of this Stipulation and Agreement, Consolidated shall decrease and may increase its rates to reflect changes in its rate base resulting from net changes in the amount of outstanding advance payments. Such changes shall be coincident with Consolidated's Purchased Gas Adjustment filings.

The change in cost of service for changes in the amount of advance payments shall be determined by multiplying 19.81 percent (adjusted to reflect any changes pursuant to Article III) by the difference between (a) the balance of advance payments estimated to be outstanding as of the proposed effective PGA date and (b) the base amount of $19,370,597 included in the rate base used in determining the costs of service shown on Appendix A or such base amount adjusted to reflect prior changes under this Article.

The amount so determined shall be divided by 575,351,000 Dt to determine the commodity rate change.

Article XII

Tracking for Changes in Federal Income Tax Rates

During the term of this Stipulation and Agreement, Consolidated's effective base tariff rates shall be decreased and may be increased to reflect changes in its cost of service for changes in the corporate federal income tax (FIT) rate of 46 percent (or surcharge thereon) which was utilized in the costs of service set forth in Appendix A attached hereto.

In making a change related to changes in FIT rates under this Article, Consolidated shall calculate the increase or decrease in cost of service by using the same method which was utilized in computing the federal income tax allowance in the costs of service set forth in

Appendix A attached hereto and shall reflect the interest cost contained in Appendix B.

In the event of a change in the corporate FIT rate, rate changes under this Article shall become effective on the first day of the calendar month following the effective date of such change.

Rate changes under this Article shall employ the filed allocation and rate design methodology unless another method is ultimately approved by the Commission.

Article XIII

Term

This Stipulation and Agreement shall become effective on the date that a Commission order approving it becomes final and no longer subject to judicial review. The term of this Stipulation and Agreement, referred to in various articles, shall end on the date that a general rate filing by Consolidated under Section 4 of the Natural Gas Act is made effective or the effective date of rates for Consolidated pursuant to a Section 5 proceeding.

Article XIV

Reservations

Neither Consolidated, the Commission Staff, nor any person or party shall be bound or prejudiced by any part of this Stipulation and Agreement unless it is approved and made effective as to all of its terms and conditions without modifications.

This Stipulation and Agreement represents a compromise in an effort to conclude the contested issues in this rate proceeding and neither Consolidated nor the Commission, its Staff, nor any other party to these proceedings in approving, agreeing to, or not opposing this Stipulation and Agreement shall be deemed to have accepted, agreed, or consented to any theory or principle or data

underlying or which may be asserted to underlie this Stipulation and Agreement, and do not intend that the resolution of this case in this settlement may be deemed "settled practice" as that term was interpreted in *Public Service Comm'n of New York* v. *FERC*, D.C. Cir. No. 79-2182, *et al.*, issued September 24, 1980, slip op. at 14. In addition, neither Consolidated nor the Commission, its Staff, or any other party to these proceedings shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein. This Stipulation and Agreement is submitted pursuant to Section 1.18(e)(3) of the Commission's Rules of Practice and Procedure and if not approved in its entirety without conditions is privileged, and the terms hereof shall be null and void, of no effect and may not be used in any way to prejudice any party's litigating position in any proceeding before the Commission. Moreover, it is stipulated and agreed that all parties reserve their right to a hearing in the event that this Stipulation and Agreement is not approved in its entirety without conditions.

APPENDIX A

PRIVILEGED

CONSOLIDATED GAS SUPPLY CORPORATION

Summary Cost of Service
Twelve Months Ended September 30, 1979, As Adjusted

Line No.	Particulars	Total Cost of Service
	(1)	(2)
1	Operation & Maintenance Expenses	$1,304,001,145
2	Depreciation, Depletion & Amortization Expenses	32,285,416
3	Taxes Other Than Income Taxes	27,017,616
4	Income Taxes	51,349,046
5	Other Operating Revenues Credited to Cost of Service	(35,726,712)
6	Return at 12.03%	76,301,521
7	Subtotal	$1,455,228,032
8	Effect of Pricing Company Owned Production at the Current Weighted Average Cost of Purchased Gas in Lieu of Actual Costs	2,408,237
9	Total	$1,457,636,269

PRIVILEGED

CONSOLIDATED GAS SUPPLY CORPORATION

Summary Cost of Service
Twelve Months Ended September 30, 1979, As Adjusted
For Rates to be Effective April 1, 1981

Line No.	Particulars	Total Cost of Service
	(1)	(2)
1	Operation & Maintenance Expenses	$1,304,932,067
2	Depreciation, Depletion & Amortization Expenses	32,285,416
3	Taxes Other Than Income Taxes	27,017,616
4	Income Taxes	53,006,050
5	Other Operating Revenues Credited to Cost of Service	(35,726,712)
6	Return at 12.03%	78,862,777
7	Subtotal	$1,460,377,214
8	Effect of Pricing Company Owned Production at the Current Weighted Average Cost of Purchased Gas in Lieu of Actual Costs	2,408,237
9	Total	$1,462,785,451

APPENDIX B

PRIVILEGED

Consolidated Natural Gas Company and
Subsidiary Companies—Consolidated

Cost of Capital as of June 30, 1980

Line No.	Type of Capital	Amount	% of Total Capitalization	Annual Cost of Capital
	(1)	(2)	(3)	(4)
1	Long-Term Debt	$ 649,384,000	38.5%	[1]
2	Common Stockholders' Equity	991,797,000	58.8	
3	Preferred Stock	45,000,000	2.7	11.26%
4	Total Capitalization	$1,686,181,000	100.0%	

[1] For the purpose of computing income taxes only, it is agreed that the annual cost of Long-Term Debt shall be the gross interest at 7.78%.

APPENDIX C

CONSOLIDATED GAS SUPPLY CORPORATION
FERC Gas Tariff
Third Revised Volume No. 1

Fifth Revised Sheet No. 66
Superseding
Fourth Revised Sheet No. 66

GENERAL TERMS AND CONDITIONS (continued)

12. PURCHASED GAS COST ADJUSTMENT

Seller shall file, semi-annually, as part of Third Revised Volume No. 1 of this tariff, Revised Sheet No. 16 to reflect increases, and Seller shall file decreases, if any, in the rates thereunder, based upon increases or decreases in the cost of Seller's purchased gas. For the purpose of this Section, purchased gas cost shall be the cost of wellhead purchases, field line purchases, plant outlet purchases, transmission line purchases, and pipeline production that qualifies for area, nationwide or statutory rate treatment. Calculation of rate changes shall be in accordance with the following procedures:

12.1 *Pipeline Suppliers*

(a) *Change in cost of Gas.* The rates per Dt contained in Third Revised Volume No. 1 rate schedules are based on an estimated weighted average jurisdictional cost for gas billed by pipeline suppliers [1] per unit of sales (which excludes estimated jurisdictional incremental pricing surcharges from pipeline suppliers to non-exempt industrial boiler fuel facilities), hereinafter called "Base Cost of Gas from Pipeline Suppliers" included in the

[1] Jurisdictional portion of all charges in Account 803.

amounts set forth on Sheet No. 16 of Third Revised Volume No. 1 of this tariff, or as thereafter revised. Such base cost shall consist of a weighted average jurisdictional commodity cost of gas purchased and an amount equal to the allocated Demand Charges for jurisdictional sales. When rates are changed in accordance with these provisions, a new underlying "Base Cost of Gas from Pipeline Suppliers" shall be calculated in accordance with these provisions. Seller will compute its current estimated weighted average jurisdictional cost of purchased gas from pipeline suppliers [1] per unit of sales (which excludes the current estimated incremental pricing surcharge from pipeline suppliers) including LNG purchases from Consolidated System LNG Company authorized by FPC Opinion Nos. 622 and 622-A, as amended, for the purpose of determining whether a rate increased is permitted in accordance with Section 12.5, utilizing:

Third Revised Sheet No. 67
Superseding
Second Revised Sheet No. 67

GENERAL TERMS AND CONDITIONS (continued)

(i) The volumes/quantities of gas estimated to be billed by pipeline suppliers during a projected 6-month period (or such other period directed by order of the Commission) beginning with the effective date of the rate change hereunder; and

(ii) the pipeline supplier rates and charges in effect, or which will be in effect, after suspension, during the 6-month projected

period the rates filed hereunder will be in effect, or during such other period as directed by an order of the Commission.

(b) *Jurisdictional Allocation.* The estimated commodity charge portion of the cost of gas purchased from pipeline suppliers for each month of the projected period shall be allocated to total jurisdictional sales on the basis of the ratio of estimated jurisdictional sales to total estimated sales during each respective month of the projected period.

The estimated demand portion of the cost of gas purchased from pipeline suppliers shall be allocated to total jurisdictional sales on the basis of the ratio of jurisdictional sales to total sales during the sustained three-day peak period within the most recent 12-month period.

(c) *Estimated Incremental Pricing Surcharges from Pipeline Suppliers*

The jurisdictional commodity charge portion of the cost of gas purchased from pipeline suppliers during each month of the projected period (as determined in Section 12.1(b) hereto) shall be reduced by the respective monthly estimated jurisdictional incremental pricing surcharges from pipeline suppliers applicable to non-exempt industrial boiler fuel facilities as defined in Section 282.103(e) of the Regulations Under the Natural Gas Policy Act of 1978 (NGPA). The estimated jurisdictional incremental pricing surcharges from pipeline suppliers for each month of the projected period shall be based on the total of the incremental pricing surcharges estimated by Seller's pipeline

suppliers allocated to total jurisdictional sales on the basis of MSAC's (as defined in Section 12.2(c) herein) for each respective month of the projected period.

First Revised Sheet No. 67-A
Superseding
Original Revised Sheet No. 67-A

GENERAL TERMS AND CONDITIONS (continued)

(d) *Test for Change in Sales Rates.* Seller shall determine the jurisdictional unit increase or decrease per unit of sales in its estimated jurisdictional cost of purchased gas from pipeline suppliers, as reduced by Section 12.1(c) above, by subtracting the "Base Cost of Gas from Pipeline Suppliers" from the current estimated jurisdictional weighted average cost of gas per unit of sales from pipeline suppliers (which excludes the current estimated incremental pricing surcharges from pipeline suppliers).[2] If the unit change so determined equals or exceeds one-tenth of a cent (0.1¢) per Dt, Seller

[2] The current estimated jurisdictional weighted average cost of gas from pipeline suppliers shall be calculated by dividing the estimated jurisdictional cost of purchases from pipeline suppliers, plus or minus the estimated cost of net storage withdrawals or inputs for jurisdictional sales allocated to pipeline suppliers less the estimated jurisdictional incremental pricing surcharges from pipeline suppliers (computed in Section 12.1(b) and (c)) by the total estimated jurisdictional sales quantity for the projected period. The estimated cost and quantities of net storage inputs into or withdrawals from storage facilities shall be allocated to jurisdictional sales on the basis of the ratio of estimated jurisdictional sales to total estimated sales during the applicable projected period. The resultant cost and quantities shall be further allocated to pipeline supplier purchases on the basis of the ratio of estimated pipeline supplier purchases for jurisdictional sales to total estimated purchases for jurisdictional sales during said projected period.

may increase its rates in the event of an increase and shall reduce its rates in the event of a decrease.

(e) *Change in Sales Rates.* The change in the demand amount, if any, shall be determined by applying the demand rates to the respective billing demands and deducting the demand amount so calculated from the previously calculated demand amount, herein called the "Base Demand Cost of Gas from Pipeline Suppliers." The demand change, jurisdictionally allocated, shall be divided by the total Billing Demands for RQ customers during the applicable projected period plus imputed Billing Demands for customers receiving service under Rate Schedules SCQ, SCR and E to calculate the unit demand change under the RQ rate schedules. The imputed Billing Demands for customers under Rate Schedules SCQ, SCR and E shall be based on the Billing Demand load factor of the RQ customers derived from the last major general rate change filing by Seller with the Federal Energy Regulatory Commission. Such unit change shall be rounded to the nearest one cent (1.0¢) per Dt to reflect

Fifth Revised Sheet No. 68
Superseding
Fourth Revised Sheet No. 68

GENERAL TERMS AND CONDITIONS (continued)

the effect of such change and added to or subtracted from the demand component of the sales rates in the RQ rate schedule.

The current estimated commodity cost per unit of jurisdictional sales for gas billed by pipeline suppliers as adjusted to reflect the

cost of net storage inputs or withdrawals, shall have subtracted from it the "Base Commodity Cost of Gas from Pipeline Suppliers" to calculate the unit commodity change under the RQ rate schedule. Such unit change shall be rounded to the nearest one-hundredth of a cent (0.01¢) per Dt to reflect the effect of such change and added to or subtracted from the commodity component of the sales rates in the RQ rate schedule.

The total estimated cost per unit of jurisdictional sales to SCQ, SCR and E customers for gas billed by pipeline suppliers as adjusted to reflect the cost of net storage inputs or withdrawals shall have subtracted from it the "Base Cost of Gas to SCQ, SCR and E customers from Pipeline Suppliers" to calculate the unit change under Rate Schedules SCQ, SCR and E. Such unit change shall be rounded to the nearest one-hundredth of a cent (0.01¢) per Dt to reflect the effect of such change and added to or subtracted from the sales rates under the SCQ, SCR and E rate schedules.

12.2 *Producer Suppliers.*[3]

(a) *Change in Cost of Gas.* The rates per Dt contained in the Third Revised Volume No. 1 rate schedules are based on an estimated weighted average jurisdictional cost for gas purchased from producer suppliers [4] per unit

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[3] As used herein the term "purchases from producer suppliers" includes wellhead, field line and plant outlet purchases and pipeline production that qualifies for area, nationwide, or statutory rate treatment.

[4] Jurisdictional portion of all estimated charges includable in Accounts 800, 801 and 806 and for pipeline production that qualifies for area, nationwide, or statutory rate treatment.

of sales (which excludes estimated jurisdictional incremental pricing surcharges attributable to purchases from producer suppliers to non-exempt industrial boiler fuel facilities), hereinafter called "Base Cost of Gas from

Fourth Revised Sheet No. 69
Superseding
Third Revised Sheet No. 69

GENERAL TERMS AND CONDITIONS (continued)

Producer Suppliers", included in the amount set forth on Sheet No. 16 of Third Revised Volume No. 1 of this tariff, or as thereafter revised. When rates are changed in accordance with these provisions, a new underlying "Base Cost of Gas from Producer Suppliers" shall be calculated in accordance with these provisions. Seller will compute its current estimated weighted average jurisdictional cost of purchased gas from producer suppliers[4] per unit of sales (which excludes the current estimated jurisdictional incremental pricing surcharges attributable to purchases from producer suppliers), for the purpose of determining whether a rate change filing is permitted in accordance with Section 12.5, utilizing:

(i) The quantities of gas estimated to be purchased from producer suppliers during a projected 6-month period (or such other period as directed by order of the Commission) provided, however, that such supply must be attached to Seller's interstate gas transmission system as

of the effective date of the rate change hereunder;

(ii) The rates and charges for gas purchased from producer suppliers in effect or which will be in effect, after suspension, during the 6-month projected period the rates filed hereunder will be in effect or during such other period as directed by an order of the Commission; and,

(iii) The quantities of gas determined in the same manner provided in (i) above and rates attributable to pipeline production that qualifies for area, nationwide, or statutory rate treatment that will be in effect during the projected period the rates filed hereunder will be in effect.

(b) *Jurisdictional Allocation.* The estimated cost of gas purchased from producer suppliers by Seller shall be allocated to total jurisdictional sales on the basis of the ratio of estimated jurisdictional sales to total estimated sales during the projected period.

(c) *Estimated Incremental Pricing Surcharges Attributable to Purchases from Producer Suppliers.* The jurisdictional cost of gas purchased from producer suppliers [4] during each month of the project period shall be reduced by the respective monthly estimated jurisdictional incremental pricing surcharges attributable to purchases from producer suppliers (including pipeline production that qualifies for area, nationwide, or statutory rate treatment) applicable to non-exempt industrial boiler fuel facilities as

Fourth Revised Sheet No. 70
Superseding
Third Revised Sheet No. 70

GENERAL TERMS AND CONDITIONS (continued)

defined in Section 282.103(e) of the Regulations Under the NGPA. The estimated jurisdictional incremental pricing surcharges attributable to purchases from producer suppliers for each month of the projected period shall be derived as follows: *Step 1.* The total of the estimated jurisdictional incremental pricing surcharges attributable to purchases from producer and pipeline suppliers shall be calculated based on the lesser of (i) total estimated incremental gas costs from producer suppliers for each month allocated to jurisdictional sales on the basis of Maximum Surcharge Absorption Capabilities (MSAC's) (as defined in Section 282.503(b) of the Commission's Regulations Under the NGPA), plus the total estimated jurisdictional incremental pricing surcharges for the gas purchased from pipeline suppliers for each respective month (as computed in Section 12.1(c)), or (ii) the sum of the projected MSAC's of each customer of Seller. Total estimated incremental gas costs from producer suppliers for each month shall be calculated on the basis of the first sale acquisition costs at prices in excess of some base or threshold price for such gas, as specified in Section 282.301 of the Regulations Under the NGPA. The projected MSAC of a customer for such month of such period shall be reported to Seller not less than forty-five (45)

days prior to the applicable effective date of a rate change hereunder. The customer's projected MSAC's shall be calculated in accordance with the procedure for prorating MSAC's among natural gas suppliers set forth in Section 282.503(c) of the Commission's Regulations Under the NGPA. Seller shall prorate its total projected MSAC's to its interstate pipeline suppliers in accordance with the procedures set forth in Section 282.503(c) of the Commission's Regulations and report such allocated MSAC's to each pipeline supplied.

Step 2. From the total of estimated jurisdictional incremental pricing surcharges from producer and pipeline supplies shall be subtracted the total estimated jurisdictional incremental pricing surcharges from pipeline suppliers (as computed in Section 12.1(c)) to arrive at the estimated jurisdictional incremental pricing surcharge attributable to purchases from producer suppliers.

(d) *Test for Change in Sales Rates.* Seller shall determine the jurisdictional unit increase or decrease per unit of

First Revised Sheet No. 70-A
Superseded
Original Sheet No. 70-A

GENERAL TERMS AND CONDITIONS (continued)

sales in its estimated jurisdictional cost of purchased gas from producer suppliers as reduced in Section 12.2(c) above, by subtracting the "Base Cost of Gas from Producer Suppliers" from the current estimated jurisdictional weighted average cost of gas per

unit of sales from producer suppliers (which excludes the current estimated incremental pricing surcharges attributable to purchases from producer suppliers.[5] If the unit change equals or exceeds one-tenth of a cent (.01¢) per Dt, Seller may increase its rates in the event of an increase and shall reduce its rates in the event of a decrease.

(e) *Change in Sales Rates.* Such unit change calculated in Section 12.2(d), if equaling or exceeding one-tenth of a cent (0.1¢) per Dt, shall be rounded to the nearest one-hundredth of a cent (0.1¢) per Dt and added to or subtracted from the sales rates in each rate schedule; provided, however, that changes applicable to the RQ Rate Schedule shall be applied to the commodity component of that rate schedule.

12.3 *Unrecovered Purchased Gas Cost Account*

(a) *Recording of Unrecovered Purchase Gas Cost.* To permit recovery or return of the jurisdictional portion of increases or decreases in all of the cost of Seller's purchased gas, Seller shall maintain an Unre-

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[5] The current estimated jurisdictional weighted average cost of gas from producer suppliers shall be calculated by dividing the estimated jurisdictional cost of purchased gas from producer suppliers plus or minus the estimated cost of net storage withdrawals or inputs for jurisdictional sales allocated to producer suppliers less the estimated jurisdictional incremental pricing surcharges attributable to purchases from producer suppliers (computed in Sections 12.2(b) and (c)) by the total estimated jurisdictional sales quantity for the projected period. The total estimated cost and quantities of net inputs into or net withdrawals from storage facilities shall have subtracted from them the estimated cost and quantities of net inputs into or net withdrawals from storage facilities for jurisdictional sales applicable to pipeline supplier purchases (as determined in footnote 2 to Section 12.1(d)).

covered Purchased Gas Cost Account. This account will be credited or debited monthly with the deviations from the "Base Demand Cost of Gas from Pipeline Suppliers", the "Base Commodity Cost of Gas from Pipeline Suppliers," the "Base Cost of

Seventh Revised Sheet No. 71
Superseding
Sixth Revised Sheet No. 71

GENERAL TERMS AND CONDITIONS (continued)

Gas to SCQ, SCR, and E Customers from Pipeline Suppliers," the "Base Cost of Gas from Producer Suppliers", and the jurisdictional portion of refunds as provided in Section 12.6.

Deviations from the Base Cost of Gas shall be determined as follows:

(i) Demand and Commodity rates shall be determined for gas purchased from pipeline and producer suppliers' net of the cost of storage inputs or withdrawals based on the most recent general rate change filing under Section 4 of the Natural Gas Act and the most recent rate filing under this Section 12 made subsequent to such general rate change filing, if any. Such imputed rates shall be applied each month to the actual billing demands and commodity quantities to each jurisdictional Buyer under Rate Schedules RQ, SCQ, SCR and E.

(ii) The actual monthly jurisdictional revenues calculated in (i) above shall be

compared with the actual per books jurisdictional cost of gas purchased from pipeline and producer supplies net of the cost of storage inputs or withdrawals priced as described in (iii) hereto, and any under or over recovery of costs shall be recorded in Account No. 191 as either a debit or credit.

(iii) The cost of storage inputs or withdrawals shall be priced each month based on the most recent annual projection of the average cost of purchased gas. Annual projections of such average cost shall be made each calendar quarter, adjusting the average cost at the end of each calendar quarter for updated projections and for actual data for the calendar year as it becomes available with a final adjustment for actual for the year at the end of the calendar year.

(b) *Carrying Charges.* For each calendar month Seller shall compute carrying charges on the net balances in Account 191 and their related amounts in Account Nos. 283 or 190, as appropriate, as of the end of the immediately preceding month. Carrying charges shall be compounded quarterly.

Third Revised Sheet No. 71-A
Superseding
Second Revised Sheet No. 71-A

GENERAL TERMS AND CONDITIONS (continued)

The monthly rate for computation of carrying charges shall be one-twelfth of the current rate of interest on pipeline refunds es-

tablished by the Commission. Carrying charges shall be debited to Account 191 if the ending balance in Account 191 for the month is positive and shall be credited to Account 191 if the ending balance is negative.

(c) *Recovery of Unrecovered Purchased Gas Cost.* Every six months, Seller shall compute either surcharges or surcharge credits to recover or return the balance which has accumulated in Account 191 in the preceding six-month period and shall reflect such surcharges or surcharge credits in its rates on Sheet No. 16. After such surcharges or surcharge credits are approved by the Federal Energy Regulatory Commission, Account 191 shall be debited or credited, as appropriate, with contra entries to Account 805.1 so that the balance accumulated in Account 191 will be collected over the succeeding six-month period. Separate subaccounts shall be maintained for the amounts relating to the period in which the increase or decrease is accumulated and for the collection of purchased gas increases or decreases, as applicable, so as to keep each period separate.

12.4 *Reporting Requirements for Rate Changes.* Seller shall file with the Federal Energy Regulatory Commission, and serve on its Buyers and interested State Commissions, a report setting forth the computations made in accordance with the foregoing procedure along with revised Sheet No. 16 with rates reflecting such computations.

12.5 *Effective Date of Rate Changes.* Subject to the provisions of Section 12.1(c), and Section 12.2(c), changes in rates to reflect increases or decreases

in the cost of Seller's gas purchased from pipeline suppliers and producer suppliers may be filed no more frequently than every six months, unless otherwise permitted by the Federal Energy Regulatory Commission. Seller's revised tariff sheet reflecting changes under Section 12.1, 12.2, 12.3, and 12.6 shall be filed at least thirty (30) days but in no event more than sixty (60) days prior to its effective date. Such effective dates shall be March 1 and September 1.

Fourth Revised Sheet No. 72
Superseding
Third Revised Sheet No. 72

GENERAL TERMS AND CONDITIONS (continued)

12.6 *Flow Through of Supplier Refunds.*

(a) *General Rule.* If a final order of the Federal Energy Regulatory Commission results in a refund to Seller after the effective date hereof for gas purchased from any source, to the extent that such refunds relate to purchased gas costs that have previously been reflected in a purchased gas cost adjustment under the preceding paragraphs of this Section 12 or debited to the Unrecovered Purchased Gas Cost account under Section 12.3, the jurisdiction portion of such refund (including interest received) shall be passed on to Seller's jurisdictional. Buyers by crediting such refund and applicable interest to the Unrecovered Purchased Gas Cost account, separately recording such refunds applicable to pipeline suppliers and to producer suppliers; provided, however, that Seller has the right to recover from its customer any amounts

refunded which may ultimately be determined by a final nonappealable order not to be required to be refunded. If at any time prior to the calculation of Seller's semi-annual Purchased Gas Adjustment, such refunds recorded in Account 191, have reached an aggregate of $2,000,000 relative to jurisdictional service prior to January 1, 1980, Seller shall refund such amounts by check to Seller's jurisdictional Buyers in a like manner prescribed in Section 12.6(b) below. At the time of Seller's semi-annual PGA filing, Seller shall also make cash refunds to its jurisdictional customers of any accumulated supplier refunds of less than $2,000,000 relative to jurisdictional service prior to January 1, 1980, as of the preceding November 30 and May 31 in the manner prescribed in Section 12.6(b) below.

Issued by: B. H. Cooksey, Jr., President

Issued on: October 31, 1980

Effective: December 1, 1980

APPENDIX D

CONSOLIDATED GAS SUPPLY CORPORATION
FERC GAS TARIFF
Third Revised Volume No. 1

Substitute Fourth Revised Sheet No. 72
Superseding
Third Revised Sheet No. 72

GENERAL TERMS AND CONDITIONS (continued)

12.6 *Flow Through of Supplier Refunds.*

(a) *General Rule.* If a final order of the Federal Energy Regulatory Commission results in a refund to Seller after the effective date hereof for gas purchased from any source, to the extent that such refunds relate to purchased gas costs that have previously been reflected in a purchased gas cost adjustment under the preceding paragraphs of this Section 12 or debited to the Unrecovered Purchased Gas Cost account under Section 12.3, the jurisdictional portion of such refund (including interest received) shall be passed on to Seller's jurisdictional Buyers by crediting such refund and applicable interest to the Unrecovered Purchased Gas Cost account, separately recording such refunds applicable to pipeline suppliers and to producer suppliers; provided, however, that Seller has the right to recover from its customers any amounts refunded which may ultimately be determined by a final nonappealable order not to be required to be refunded. If at any time prior to the calculation of Seller's semi-

annual Purchased Gas Adjustment, such refunds recorded in Account 191, have reached an aggregate of $2,000,000 relative to jurisdictional service prior to January 1, 1980, Seller shall refund such amounts by check, unless another means is agreed upon, to Seller's jurisdictional Buyers in a like manner prescribed in Section 12.6(b) below. At the time of Seller's semi-annual PGA filing, Sellers shall also make cash refunds to its jurisdictional customers of any accumulated supplier refunds of less than $2,000,000 relative to jurisdictional service prior to January 1, 1980, as of the preceding November 30 and May 31 in the manner prescribed in Section 12.6(b) below.

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Second Revised Sheet No. 72-A
Superseding
First Revised Sheet No. 72-A

GENERAL TERMS AND CONDITIONS (continued)

12.6 *Flow Through of Supplier Refunds.* (continued)

(b) *Special Rule for Major Lump-Sum Refunds.* The provisions of Section 12.6(a) shall not apply to any refund received by Seller in a single payment which exceeds $2,000,000. When Seller receives such a payment, it shall within thirty (30) days of receipt pay the jurisdictional portion thereof (including interest received) by check, unless another means is agreed upon, to Seller's jurisdictional Buyers. The amount payable to each individual Buyer shall be determined by allocating the demand and commodity charges

included in the refund volumetrically to deliveries actually made by Seller to each Buyer during the period for which the refund is made.

12A. INCREMENTAL PRICING SURCHARGES.

12A.1 *Billing of Incremental Pricing Surcharge.* In addition to the rates shown on Sheet No. 16 of this tariff, Seller shall each month bill to each jurisdictional wholesale customer an Estimated Jurisdictional Incremental Pricing Surcharge for each respective month as shown on Sheet No. 72-C. The total of the monthly estimated jurisdictional incremental pricing surcharges attributable to purchases from producer and pipeline suppliers, (as calculated in Section 12.2(c), Step 1 herein), shall be allocated each month to each jurisdictional wholesale customer on the basis of the estimated monthly MSAC's of each customer and such allocated amount shall be the Estimated Jurisdictional Incremental Pricing Surcharge for each customer as listed on Sheet No. 72-C.

Each subsequent month, the prior month's Estimated Jurisdictional Incremental Pricing Surcharge shall be adjusted to reflect the Actual Jurisdictional Incremental Pricing Surcharge. Such Actual Jurisdictional Incremental Pricing Surcharge shall be calculated as follows:

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No. 84-1542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT

BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION

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BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION

The respondent, Public Service Commission of the State of New York (New York)[1], opposes the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit filed by the petitioner, Consolidated Gas Transmission Corporation (Consolidated).

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

It is perhaps tautological to suggest the reason for denying the writ is that Consolidated has offered no sound reason for granting the writ. Nevertheless, the Court will search the petition in vain for any adequate basis for this Court to grant plenary review of the decision below. The petition represents

[1] New York was an intervenor supporting the Federal Energy Regulatory Commission (Commission), and was on the brief of respondent before the Fourth Circuit. Pet. App. 2a.

Consolidated's last effort to recover $30 million lost because of the company's failure to follow elementary precepts of contract law. Such a mistake is hardly a special and important reason for the exercise of this Court's discretion. Rule 17.1, Rules of the Supreme Court of the United States.

As attempted justification, Consolidated argues that the Commission "frustrated" implementation of the Natural Gas Policy Act of 1978, 15 U.S.C. §3301 *et seq.* (1982) ("NGPA") and this Court's decision in *Public Service Commission of New York* v. *Mid-Louisiana Gas Co.*, 103 S. Ct. 3024 (1983) ("*Mid-Louisiana*") by refusing to permit Consolidated to recover NGPA pricing for its old pipeline-produced gas during a rate period where it lacked the contractual authority to do so. Petition at 8-9. Yet, as the Fourt Circuit recognized, the Commission allowed Consolidated to collect NGPA prices in other rate cases covering different periods where contractual authority was retained through a specific reservation in the agreement. Pet. App. at 20a. The Commission's disallowance rested upon the absence of any such contractual authority in the settlement in issue, not on any attempt to frustrate national energy policy.

As a variant justification, Consolidated argues that the Commission's "stubborn adherence" to the position rejected in *Mid-Louisiana* warrants "swift review by this Court to restore the aims" of the NGPA and the *Mid-Louisiana* mandate. Pet. at 9. Yet, the record shows the Commission implemented the aims of the Fifth Circuit's *Mid-Louisiana* decision[2] (with which it disagreed) while the matter was still being argued before this Court. Pet. App. at 24a. The Commission allowed Consolidated to collect NGPA pricing only where it had reserved authority to do so, but not where no such authority existed. *Id.* at 29a. This is hardly the stuff of "stubborn adherence" to a contrary position requiring swift (or any) review by this Court.

Finally, even if Consolidated had made a far more compelling showing that the decisions below err, such showing would not present grounds for issuing the writ. The decisions below

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[2] *Mid-Louisiana Gas Co.* v. *Federal Energy Regulatory Commission*, 664 F.2d 530 (1981).

rest upon the interpretation of one rate case settlement agreement from a series of such settlements into which Consolidated entered. The Commission's and Fourth Circuit's interpretation of that agreement involves no question of importance generally applicable to the pipeline industry. Thus even assuming that error had been committed, this Court does not sit to correct errors of law or fact of such parochial interest.

II. THE SETTLEMENT AGREEMENT GOVERNS CONSOLIDATED'S RATE TREATMENT

The issue in this case involves a dispute over the meaning of a settlement agreement between Consolidated, its customers, and the Commission setting Consolidated's rates for the period covered by Docket No. RP80-61. This issue, contrary to Consolidated's claims (Pet. at 10-11), does not conflict with national energy policy. This policy allows recovery of NGPA pricing only where contractual authority exists, not where no such authority can be found.

The issue in this case arises from the institutionalized process of settling proposed rate increases. Consolidated's filing in Docket No. RP80-61, like the vast majority of such proposals, was suspended, within the thirty day statutory period, by Commission order which also made collection of the proposed rates after suspension subject to refund and set a hearing to determine whether the proposed rates were just and reasonable. 15 U.S.C. §717c(a).[3] Subsequent discussions between the parties led to a settlement agreement fixing Consolidated's rates in that docket.

In settlements at the Commission (both in the instant case and generally), reservation clauses allow the parties "to agree to disagree" about certain issues while settling other

[3]The order in Docket No. RP80-61 also rejected a proposed tariff sheet pricing old pipeline production at NGPA rates, and instead accepted and suspended an alternative tariff sheet filed by Consolidated in which the old pipeline production is reflected at cost-of-service pricing. Pet. App. at 29a-30a.

issues. Such clauses reserve the ultimate resolution of a disputed issue by tying its determination to resolution of the same issue in another proceeding or by setting a narrowly focused hearing on the reserved issues in the same docket. *See* Pet. App. 70a-75a (Articles III-VI and VIII reserving rate treatment of issues).

The issue in this case is whether, in the absence of a clause in the RP80-61 settlement reserving Consolidated's claim to collect NGPA rates for its old production, Consolidated may retroactively collect revenues in excess of the agreed settlement rates on grounds that the *Mid-Louisiana* decision, allowing NGPA pricing for old pipeline production, overrides this lack of contractual authority.

In Docket No. RP80-61, contrary to Consolidated's assertion (Pet. at 11), its right to collect NGPA prices for its old pipeline production was an issue from the inception of the case. Consolidated segregated the pricing of its old pipeline production in filing alternate tariff sheets: one reflecting NGPA rates and the other reflecting cost-of-service prices for this production. The Commission rejected the tariff sheet with NGPA pricing, and, instead, required that the tariff sheet with cost-of-service pricing be made effective. Pet. App. at 29a-30a. Consolidated did not seek review of this rejection. Thus, the only effective tariff sheets and rates in Docket No. RP80-61 were based on cost-of-service pricing for old pipeline production, placing the burden upon Consolidated to press for a change if it so desired.

Consolidated, in a separate PGA (purchased gas adjustment) docket, asserted a right to collect NGPA rates retroactively for old production, Pet. App. 22a, more than a year after the settlement agreement in Docket No. RP80-61 was approved by the Commission. Pet. App. 1a. In a subsequent order in this PGA docket, the Commission looked to the settlement agreements covering past periods to judge whether the proposed retroactive collection of NGPA rates was consistent with the settlement terms. Pet. App. 24a-25a.

The Commission determined that the RP80-61 settlement did not allow a retroactive surcharge to collect NGPA rates in lieu of the cost-of-service rates. Retroactive surcharges

were permitted, however, for the periods covered by rate settlements before and after Docket No. RP80-61 where reservation clauses provided for recovery of such additional amounts in the event Consolidated prevailed in *Mid-Louisiana. E.g.* Pet. App. 20a. In short, the Commission's action turned on contractual authority, not on its interpretation of the NGPA. Nor did this action abrogate Consolidated's tariff "rights": the only effective tariff sheet in Docket No. RP80-61 reflected cost-of-service pricing for old pipeline production. Consolidated's PGA proposals to collect NGPA prices retroactively were suspended and made subject to refund pending resolution of the issue. Pet. App. 63a-64a and 24a. Thus the inclusion of a reservation clause in the Docket No. RP80-61 settlement was the only option by which Consolidated could have preserved any right to retroactive recovery.

III. THE NGPA DOES NOT OVERRIDE CONTRACTUAL ARRANGEMENTS

The unstated premise of Consolidated's argument — it should be allowed NGPA rates regardless of the rate settlement, *e.g.* Pet. at 14, — implies that the NGPA overrides contractual and regulatory authority to set rates at other levels. Such an implication is at odds with the NGPA, its legislative history, and judicial interpretation.

The NGPA establishes a series of ceiling prices for various categories of gas through reference to "maximum lawful rates." 15 U.S.C. §§3312-3319. These ceiling prices are not applied, however, in those cases where the contract requires a lower price. Section 101(b)(9) of the NGPA. 15 U.S.C. §3311(b)(9). In such cases, the lower price, not the NGPA rate, is controlling, as clarified in the legislative history:

> "In no case may a seller receive a higher price than his contract permits."

S. Rep. No. 1126, 95th Cong., 2d Sess. 74 (1978).

In discussing the relationship between NGPA authority and contractual authority to set rates, the Fifth Circuit followed

an approach, similar to that in the instant case, of looking to the underlying contract to determine authority for collection of higher rates. The Fifth Circuit found the NGPA followed the contractual authority precepts for rate filings established by the *Mobile-Sierra* doctrine[4]:

> [Section 101(b)(9) of the NGPA] simply codifies the ceiling price corollary made plain in *Mobile-Sierra*. The statute's operation is limited to keeping sales prices from exceeding the ceiling, therefore contractual authority is required to collect permissible rates, and sellers are given no power to avoid the obligation of a fixed price contract. The statute and its legislative history confirm this view.

Pennzoil Co. v. *FERC*, 645 F.2d 360, 374 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). The Fifth Circuit reached the conclusion that the NGPA did not override private contracts:

> "... this Court holds that section 101(b)(9) is Congress' express and specific intent not to preempt the ability of private persons to contractually govern their relationship."

Id. at 375.

An argument similar to Consolidated's claim that the NGPA is overriding was recently addressed by this Court in *Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983), where the issue was "whether the governmental price esclalator clauses of [specified] contracts were triggered by the enactment of §105 [of the NGPA]." 459 U.S. at 419. The Court found that "as a matter of federal statutory interpretation, the Act does not trigger such clauses automatically."

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[4]The *Mobile-Sierra* doctrine governs the ability of a pipeline to adjust its rates under the Natural Gas Act in the face of "fixed rate" contracts or variants thereof. The doctrine was developed from this Court's opinions in *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and their progeny.

Id. Instead of allowing the higher NGPA price to control, the Court found that the lower price required by the contract was controlling. *Id.* at 420.

The decisions below are consistent with the proper interpretation of the NGPA, which requires referral to the contract to determine the extent of a party's ability to collect NGPA prices. The Commission and the Fourth Circuit found that contractual authority was lacking for the RP80-61 rate period. Absent such authority, the NGPA by itself does not allow recovery of higher rates.

IV. THE SETTLEMENT AGREEMENT DOES NOT RESERVE ANY RIGHT TO COLLECT NGPA PRICES

Consolidated argues that the Commission established "a *new* test to be applied to [an earlier executed] settlement agreement" requiring a specific reservation clause with respect to its claimed right to NGPA pricing "although that right was never an issue in the general rate case." Pet. at 10-11. Consolidated is wrong on both counts.

The Commission did not establish a new, after-the-fact test for judging the settlement agreement simply because its analysis occurred after the agreement was executed. The Commission looked to established precedent regarding the meaning and application of settlement agreements in the context of rate filings. Pet. App. 26a-28a.

Regarding the specific contention that the general reservation clause in the RP80-61 settlement was adequate to reserve Consolidated's purported right to collect NGPA pricing if it prevailed in *Mid-Louisiana*, (Pet. at 11), little needs be said. This was an issue that should have been dealt with specifically in the agreement, Pet. App. 38a n.9; in the words of the Fourth Circuit, "why, if the generalized reservation had the excessively broad scope of meaning now asserted for it by [Consolidated], was it necessary in the RP79-22 settlement agreement [immediately preceding RP80-61] to insert so explicit

a reservation of the NGPA pricing right." Pet. App. 18a. n.22. The decisions below recognize that given the detailed reservations on several other issues in the RP80-61 agreement (Pet. App. at 70a-74a) and the explicit reservations of NGPA pricing in other dockets — all in addition to a general reservation — the only reasonable interpretation is that in RP80-61, Consolidated bargained away this right in return for other concessions:

> "It is a reasonable interpretation device to conclude that what someone has not said, someone has not meant."

Pet. App. at 19a.

V. ANY WAIVER OF A RIGHT WAS DONE KNOWINGLY

Consolidated argues that, because the Commission found the settlement was silent on the NGPA pricing issue, the Fourth Circuit erred as a matter of law by allowing a forfeiture of a "statutory right" by silence. Pet. at 14-16. As previously pointed out the argument is circular since Consolidated's statutory right to collect NGPA ceiling prices is dependent upon retention of contractual right to collect NGPA ceiling rates as part of the RP80-61 settlement agreement. Having drafted the agreement, Consolidated cannot now contend the Commission required it to forfeit a right by refusing to read into the agreement that which is not there.

Totally baffling within this argument is Consolidated assertion that "the Fourth Circuit ignored the Commission's specific finding that the [RP80-61] settlement was silent on the issue of NGPA pricing for old pipeline production." Pet. at 14. Far from ignoring it, the Fourth Circuit expressly contrasted the fact that "the pipeline production issue is not addressed at all in the body of the settlement agreement" with the fact that supporting costs for the settlement rates included cost-of-service pricing for this production. Pet. App. 14a. The court noted that any reservation of this "crucial issue"

should have been made in the body of the agreement. *Id.* The court stated "one searches in vain for the reservation" explicitly or implicitly. *Id.* The Fourth Circuit concluded from this silence that Consolidated "hardly would have entered an agreement intending to reserve the NGPA pricing issue without saying so." Pet. App. at 21a.

Moreover, any waiver was knowing in that the company included in the settlement supporting cost data showing cost-of-service pricing for its production, which followed the Commission's acceptance of the Consolidated alternate tariff sheet showing cost-of-service pricing. Finally, Consolidated was or should have been aware that it had drafted a specific clause reserving this point in the prior (as well as the following) rate settlements.

The cases cited by Consolidated as showing "a position opposite of that taken here" (Pet. at 15) are distinguishable by the fact that the possible waiver involved third parties who were not direct signatories of an agreement, but whose rights could be affected by it. In *Arkansas-Louisiana Gas Co.*, 28 FERC (CCH) ¶61,005 (1984), the Commission noted the differences in possible waiver situations.

> We caution, however, that the foregoing conclusion depends upon a knowledgeable waiver of Title IV rights. Such a waiver is obvious in a direct sale situation. We would not necessarily reach the same conclusion if presented with a similar proposal but involving distributors where knowledgeable waivers from ultimate end-users may not be obtainable.

Id. at p. 61,009. It is not difficult to see why the Commission refused to find that end-users had waived their rights in the latter situation. In the instant case Consolidated was the only party seeking a rate increase, and it was knowledgeable about its filing and settlement.[5]

[5]The other gas cited by Consolidated, *Columbia Gas Transmission Corp.* v. *Tennessee Gas Pipeline Co.*, 29 FERC (CCH) ¶61,203 (1984), Pet. at 16, merely stands for the proposition that the silence of a settlement agreement with respect to a pipeline's customers' right to challenge subsequent rate increase filings as imprudent did not extinguish the customers' statutory rights to challenge pipeline rate filings. *Id.* at p. 61,408. Because such challenges constitute the fundamental protection of the Natural Gas Act, a waiver of such right must be clearly identified. In contrast, the right of a pipeline to collect rates in excess of the agreed settlement level based upon resolution of a disputed issue was in the normal course a matter of express reservation in the settlement agreement.

CONCLUSION

Consolidated's petition presents no special and important reason for issuing the writ. The case involves a narrow issue applying to only one in a series of similar rate settlements; it is consistent with the NGPA which requires that the contract price control; and, it is consistent with well-established principles of contract law.

WHEREFORE, New York submits that the petition must be denied.

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission correctly interpreted a settlement agreement entered into by petitioner and petitioner's customers and approved by the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 745 F.2d 281. The orders of the Federal Energy Regulatory Commission (Pet. App. 22a-43a) are reported at 22 F.E.R.C. ¶ 61,120 and 23 F.E.R.C. ¶ 61,018.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1984. A petition for rehearing was denied on October 31, 1984. On January 10, 1985, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including March 30, 1985, and the petition was filed on March 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates an interstate natural gas pipeline serving portions of the northeastern United States. Petitioner's rates for the resale of natural gas are subject to regulation by the Federal Energy Regulatory Commission (FERC) under Section 4(a) of the Natural Gas Act of 1938, which requires that such rates be "just and reasonable." 15 U.S.C. 717c(a). This case concerns the Commission's interpretation of a settlement agreement entered into by petitioner and its customers, and approved by the Commission pursuant to its authority under the Natural Gas Act. See generally *Mobil Oil Corp.* v. *FPC,* 417 U.S. 283 (1974).

One element of the rates charged by a pipeline for natural gas is the price that the pipeline receives for any "old" gas that is produced by the pipeline itself.[1] The Commission in the past valued this gas on the basis of the cost to the pipeline of producing the gas (the "cost of service" methodology). But the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.,* has altered the regulatory structure applicable to sales of natural gas.[2] The statute establishes prices for a "first sale" of natural gas. 15 U.S.C. 3311-3319. The Commission first concluded that gas produced by pipelines did not qualify for "first sale" treatment, and required interstate pipelines to continue pricing their "old" gas under the cost of service methodology. See *Order No. 58,* 44 Fed. Reg. 66577 (1979); *Order No. 98,* 45 Fed. Reg. 53091 (1980);

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[1]"Old" gas is gas produced from wells drilled before January 1, 1973, on leases acquired before October 8, 1969. See *Pipeline Production Area Rate Proceeding (Phase I),* 42 F.P.C. 738, 745 (1969), aff'd *sub nom. City of Chicago* v. *FPC,* 458 F.2d 731 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972).

[2]This Court reviewed the history of pre-NGPA regulation in *Public Service Commission* v. *Mid-Louisiana Gas Co.,* 463 U.S. 319, 327-331 (1983).

Order No. 102, 45 Fed. Reg. 67083 (1980). However, several pipeline companies, including petitioner, sought review of the Commission's orders and, ultimately, this Court agreed with the Fifth Circuit in rejecting the Commission's conclusion. *Public Service Commission* v. *Mid-Louisiana Gas Co.,* 463 U.S. 319, 338 (1983).

2. During the time that this issue was in litigation, petitioner filed for several rate increases. The increased rates reflected, among other things, petitioner's contention that its "old" gas should receive NGPA "first sale" treatment. Petitioner and its customers entered into settlement agreements in some of these rate cases.[3] The first settlement agreement (1979 Agreement) covered petitioner's rates for the period from December 1, 1978 (the effective date of the NGPA), through June 30, 1980. The agreement contained an express reservation of the question at issue in the *Mid-Louisiana Gas Co.* litigation — the treatment to be accorded pipeline production of "old" gas (C.A. Supp. App. 19):

> The treatment of pipeline production * * * shall be an issue reserved for hearing and Commission decision which decision shall be made on the basis of the hearing record or any subsequent settlement agreement.
>
> * * * * *
>
> This agreement to reserve the pipeline production issue * * * shall not affect any party's right to seek rehearing, stay, and court review as to the applicability of the NGPA to such production and the validity of the Commission's rules, regulations, and orders thereunder.

---

[3]As the court below observed (Pet. App. 9a), "[t]he practice has not been uncommon for a pipeline company and the FERC to negotiate a settlement once a rate increase request has been set for hearing."

The settlement was approved by the FERC, which described the agreement as "reserv[ing] the pipeline production issue." *Consolidated Gas Supply Corp.*, 9 F.E.R.C. ¶ 61,185, at 61347 (1979).[4]

A second settlement agreement (1980 Agreement) set petitioner's rates for the period July 1, 1980 to December 31, 1981 (see Pet. App. 67a-81a). Although the agreement contained express reservations regarding several issues (see, *e.g.*, *id.* at 70a, 73a), it did not include a reservation of the production pricing issue similar to the provision in the 1979 Agreement. The 1980 Agreement contained boilerplate language stating (*id.* at 81a) that neither petitioner, the Commission nor other parties "shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein." This agreement also was approved by the Commission. *Consolidated Gas Supply Corp.*, 15 F.E.R.C. ¶ 61,006 (1981). The discussion of reserved issues in the Commission's order did not refer to the pipeline production issue.

3. After the Fifth Circuit held that pipeline production was eligible for "first sale" treatment under the NGPA, petitioner sought to recover those prices for the period from December 1, 1978 to December 31, 1981.[5] The Commission acknowledged that petitioner could price its current production under the the NGPA, but held that the settlement agreements governed petitioner's ability to reprice its gas retroactively for the periods covered by the agreements (Pet. App. 24a-26a).

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[4]Several more recent settlement agreements entered into by petitioner also included specific reservations of this issue. See FERC C.A. Br. App. A at 2; FERC C.A. Br. App. B at 5.

[5]The Fifth Circuit's mandate issued prior to this Court's decision in *Public Service Commission* v. *Mid-Louisiana Gas Co.*, *supra*.

With respect to the 1979 Agreement, the Commission held that petitioner had reserved the right to make retroactive price adjustments in the event the Commission's pipeline production pricing rule was overturned (Pet. App. 29a). The Commission reached a different result regarding the effect of the 1980 Agreement. It found (*id.* at 30a) that "[t]he body of the agreement does not address the pipeline production pricing issue. * * * The agreement does not preserve any right to assert NGPA treatment for pipeline production." The Commission held that the general reservation provision did not reserve petitioner's right to implement the higher prices for the period covered by the 1980 Agreement (*ibid.*).

4. The court of appeals unanimously affirmed (Pet. App. 1a-21a). The court held that the 1980 Agreement did not reserve to petitioner the right to retroactively price its gas at the higher NGPA levels. It stated (*id.* at 17a-18a) that the specific reservation of this issue in the 1979 Agreement and the absence of such a reservation in the 1980 Agreement supported this conclusion:

> [H]aving compared the two agreements, it is impossible to conclude that they mean the same thing and have the same effect insofar as a) allowing retroactive gas pricing at the NGPA level and b) permitting surcharges to effect collection. [Petitioner] clearly exhibited its awareness of how to put a matter finally to rest and, equally, of how to reserve issues.

Finding that "[i]t is a reasonable interpretation device to conclude that what someone has not said, someone has not meant" (*id.* at 19a), the court concluded that petitioner failed to reserve the pricing issue in the 1980 Agreement.

ARGUMENT

Petitioner mischaracterizes the FERC's order in this case as an attempt to undermine this Court's decision in *Public*

Service Commission v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). The Commission permitted petitioner to recover retroactively the higher rates authorized by *Mid-Louisiana Gas Co.* where petitioner reserved the issue in its settlement agreement. Thus, the only question presented here is whether the Commission and the court of appeals properly concluded that petitioner failed to reserve its right to such retroactive price increases in the 1980 Agreement.[6] The unanimous decision of the court of appeals with respect to this question is correct and does not conflict with any decision of this Court or any decision of another court of appeals. Further review of this fact-bound issue is not warranted.

1. The Commission's interpretation of the 1980 Agreement clearly is correct.[7] The 1980 Agreement does not include a provision specifically reserving petitioner's rights with respect to the pricing of pipeline production, in contrast to the specific reservation that was included in the 1979 Agreement and that also appears in more recent settlement agreements entered into by petitioner (see pages 3-4 & note 4, *supra*). The court of appeals properly found (Pet. App. 20a) that "the reservation in [the 1979 Agreement] and the lack of reservation in the [1980 Agreement] spring forth and

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[6]Petitioner does not argue that the NGPA should be read to override the settlement agreement. Such an argument would, of course, be wholly without merit. Congress made clear that the prices authorized by the NGPA "are ceiling prices only. In no case may a seller receive a higher price than his contract permits." S. Conf. Rep. 95-1126, 95th Cong., 2d Sess. 74 (1978). Since the settlement agreement certainly is no less binding than a contract, petitioner could not recover the higher NGPA rates if those rates are precluded by the settlement agreement.

[7]As the court below observed (Pet. App. 19a-20a & n.23), the Commission's interpretation of the settlement agreement is entitled to deference. Cf. *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d 509 (5th Cir. 1981); *Coca-Cola Co.* v. *Atchison, Topeka, & Santa Fe Ry.*, 608 F.2d 213, 222 (5th Cir. 1979).

compel the conclusion that the hope of NGPA pricing for the July 1, 1980 through December 31, 1981 period had been discarded by [petitioner], presumably in return for another benefit or benefits."

This difference between the two agreements is especially probative because the 1980 Agreement does contain specific reservations relating to several other issues. For example, Article III of the agreement provides that the rate of return on equity to be applied in setting rates would be the rate fixed in a pending review proceeding (see Pet. App. 70a-71a). Similarly, Article IV provides that with respect to a dispute concerning certain other charges "[i]t is stipulated and agreed that this issue be reserved and tied to the outcome of a similar issue in Texas Gas Transmission Corporation (Texas Gas), Docket No. RP78-94. A Commission resolution of the merits of that issue in the Texas Gas proceeding shall be applied to this reserved issue." Pet. App. 71a; see also *id.* at 74a (reserving storage accounting issue "for disposition by settlement or hearing in this Docket"). The absence of a specific reservation of the production pricing issue in the face of this litany of express reservations provides further evidence that the 1980 Agreement does not permit the price increases sought by petitioner. See *id.* at 17a-18a.

Moreover, the 1980 Agreement states that it was intended "to provide for the resolution of all of the cost of service issues" pending before the Commission in the particular docket (Pet. App. 67a). The Commission found that the settlement "expressly provide[d] for pricing of pipeline production on a cost-of-service basis," and that the failure to reserve the issue therefore was determinative (*id.* at 30a-31a). The court of appeals agreed (*id.* at 14a) that "[s]ince the proper pricing of 'old' gas was a crucial issue in [the proceeding culminating in the 1980 Agreement], any reservation of rights should have been specifically enunciated in

the settlement." It concluded that "[i]t is a reasonable interpretation device to conclude that what someone has not said, someone has not meant" (*id.* at 19a).[4] In view of petitioner's practice of explicitly reserving the issue in other settlement agreements, the presence of specific reservations with respect to other issues in the 1980 Agreement, and the fact that the pricing of pipeline production was a major issue in the 1980 proceeding, the Commission and the court below properly found that petitioner failed to reserve the right to retroactively assess its customers on the basis of an increased price for pipeline production.

2. Petitioner raises a number of arguments challenging this result, none of which has merit.

a. Petitioner first claims (Pet. 10-11) that the Commission applied an "unprecedented" (*id.* at 10) test in interpreting the settlement agreement. This assertion is incorrect. The Commission followed settled rules of contract interpretation as did the court of appeals, which reached the same conclusion as the Commission "purely as a matter of contract interpretation common to many areas of legal endeavor" (Pet. App. 20a (footnote omitted)).

b. Petitioner also asserts (Pet. 14-17) that "the Fourth Circuit ignored the Commission's specific finding that the 1980 rate case settlement was silent on the issue of NGPA pricing for old pipeline production" (*id.* at 14), but there was no disagreement between the Commission and the court of appeals. The court of appeals agreed that the settlement was silent with respect to the availability of

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[4]The 1980 Agreement did contain a boilerplate general reservation provision (see Pet. App. 80a-81a), but the Commission (*id.* at 30a-31a) and the court of appeals (*id.* at 18a-19a) properly concluded that this general provision could not be read to override the parties' specific intent to resolve the "cost of service issues," which included the question of the pricing of pipeline production.

NGPA pricing (see Pet. App. 14a, 18a). Both the Commission (*id.* at 26a-27a) and the court of appeals (*id.* at 19a) relied upon *Texas Eastern Transmission Corp.* v. *FPC*, 306 F.2d 345 (5th Cir. 1962), cert. denied, 375 U.S. 941 (1963), in concluding that the agreement could not be interpreted to permit retroactive price increases because of the absence of a specific reservation of the pipeline production issue.

c. Finally, petitioner argues (Pet. 12-13 & n.31) that its right to increase rates through purchased gas adjustment (PGA) proceedings somehow is relevant to its ability to retroactively increase its prices. A PGA clause in a pipeline company's rate tariff enables the company to adjust its rates to reflect changes in gas costs without initiating a general rate proceeding under Section 4 of the Natural Gas Act of 1938. See 18 C.F.R. 154.38(d)(4). Petitioner argues that it was free to use the PGA procedure to increase its rates to reflect the NGPA prices for pipeline production. However, a pipeline cannot use the PGA procedure to evade restrictions imposed as a result of a Section 4 rate proceeding or agreements between the pipeline and its customers. See *Florida Gas Transmission Corp.* v. *FERC*, 741 F.2d 1307, 1311 (11th Cir. 1984); *Associated Gas Distributors* v. *FERC*, 706 F.2d 344, 347-348 (D.C. Cir. 1983). Thus, petitioner could not recoup higher prices for its pipeline production through PGA filings if such prices were not permitted by the 1980 Agreement. For the reasons discussed above, it is plain that the agreement bars petitioner from recovering these higher prices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-1542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION

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ARGUMENT

The Government's and New York's opposition attempt to characterize the dispute in this case as merely one of whether the Commission properly interpreted a settlement agreement. The significance of the petition, however, lies in the fact that the Commission's orders are simply a vehicle carefully crafted to deny pipelines the full retroactive effect of this Court's decision in *Public Service Commission v. Mid-Louisiana Gas Co.*[1]

In *Mid-Louisiana*, this Court concluded that when Congress enacted the NGPA it intended that natural gas produced by interstate pipelines be priced under the statutory scheme established in NGPA Title I: "an incentive pricing scheme that is wholly divorced from the tradi-

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[1] 463 U.S. 319 (1983).

tional historical-cost methods applied by the Commission in implementing the NGA." [2] The effective date of Title I was December 1, 1978. Thus, *Mid-Louisiana* required the Commission to price all of Petitioner's pipeline production under Title I as of that date.

Despite the Commission's recent acknowledgement that it is required to give full retroactive effect to *Mid-Louisiana*,[3] the orders on review in this case maintain that the Commission has the discretion to determine whether and under what circumstances *Mid-Louisiana* will be applied retroactively:

> The Commission is obligated to implement the mandate of the *Mid-La* court . . . . Nevertheless we do have the duty to determine *the extent to which* we will implement *Mid-La* retroactively . . . .[4]

The Commission was faced with the following facts at the time that it issued the orders under review:

1. Petitioner had taken the firm view that all of its pipeline production was required by law to be included in its purchased gas cost adjustment ("PGA") and priced at NGPA levels; [5]
2. Petitioner had specifically provided in its Commission-approved tariff for the collection of statutory prices for *all* pipeline production; [6]
3. Petitioner had established its right to collect NGPA prices in the Fifth Circuit's *Mid-Louisiana* decision;
4. The Fifth Circuit denied a stay and rehearing of that decision;

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[2] *Id.* at 333.

[3] Order No. 391, 49 Fed. Reg. 33849, 33855-57 (1984).

[4] App. 24a (emphasis added).

[5] Pet. at 3-6.

[6] Pet. at 12-13.

5. Petitioner had filed for, and was permitted by the Commission to collect, NGPA prices for all of its pipeline production from December 1, 1978; and
6. No party objected to or protested Petitioner's authority to collect those prices on the grounds that the 1980 settlement barred such collections.

Confronted with these facts, the Commission sought to eviscerate this Court's *Mid-Louisiana* decision by applying an order it had written in *El Paso Natural Gas Company*[7] to all pipelines seeking to implement *Mid-Louisiana* for past periods—even in totally inapposite situations. In *El Paso*, the settlement agreement provided that old pipeline production would be priced on a cost-of-service basis.[8] Disregarding the fact that Petitioner's settlement did not make a similar statement, as the Commission admits,[9] the Commission used *El Paso* to assert that interstate pipelines, even those actively litigating their right to collect NGPA prices, presumably relinquished that right for some other, unstated benefit.

Petitioner was not the only pipeline to fall victim to this *post facto, pro forma* decisionmaking.[10] Mid-Louisiana Gas Company, Kentucky West Virginia Gas Company, and National Fuel Gas Supply Corporation all have appeals pending in the United States courts of appeals raising the same question.[11]

It is, therefore, not Petitioner that seeks to use *Mid-Louisiana* to recapture benefits that it bargained away. Rather, it is the Government that seeks to retain the re-

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[7] 20 F.E.R.C. (CCH) ¶ 61,443 (1982) *reh. denied*, 21 F.E.R.C. (CCH) ¶ 61,219 (1982), *appeal docketed*, No. 82-2172 (D.C. Cir. Sept. 30, 1982).

[8] App. 25a.

[9] App. 30a.

[10] Pet. at 11 n.28.

[11] Petition at 11, n. 28. Other interstate pipelines have not received retroactive collections, for varying periods of time, but have opted not to pursue the matter.

sults of its unlawful and vacated regulations by restricting the application of *Mid-Louisiana* to a prospective period.

The Government points to the specific reservation of the pipeline production issue in the 1979 rate case settlement as evidence that the issue had been compromised in the 1980 rate case settlement. Even if it were appropriate to look to the 1979 settlement to resolve this issue,[12] there were valid reasons for the inclusion of the reservation language in the 1979 settlement, not present at the time of the 1980 agreement. In the 1979 agreement, Consolidatd withdrew its claim of "special circumstances" for *new* pipeline production.[13] As a result, the agreement terminated several earlier proceedings related to pipeline production, and reserved the pipeline production pricing issue in two other dockets.[14] The claim of "special circumstances" was not an issue in the 1980 rate case.

In any event, if all the parties to the 1980 rate case settlement had intended to compromise their litigation position in *Mid-Louisiana*, the unanswered question remains why *none* of the parties protested Petitioner's PGA

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[12] The Government's argument that Petitioner bargained away its right to the *Mid-Louisiana* benefits in the 1980 rate case settlement is based on the erroneous premise that NGPA pricing was an issue in that case. The Commission's regulations in effect at that time provided that Petitioner's PGA proceedings were the *exclusive* forum for the resolution of this issue. In those PGA proceedings, Petitioner had preserved its right to NGPA prices for its pipeline production in its PGA filing and through a tariff amendment. Pet. at 4-5.

[13] Under a claim of "special circumstances," a pipeline company seeks cost of service pricing for its pipeline production, rather than the area or nationwide prices.

[14] Later general rate case settlements explicitly reserved the *Mid-Louisiana* issue because the theory advanced by the Commission in *El Paso* had already been raised by the parties to that proceeding. *See* El Paso Natural Gas Co., 18 F.E.R.C. (CCH) ¶ 61,305 at p. 61,650 (1982).

filing to collect NGPA prices for its old pipeline production retroactively to December, 1978. The petition and this reply provide the answer: The Government's contract "interpretation" argument is merely a ploy to divert this Court's attention from the Commission's recalcitrance.

CONCLUSION

The Writ should be granted.

Respectfully submitted,

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